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Supreme Court of the United States

ATLANTIC RICHFIELD COMPANY *et al.*,
Petitioners,

v.

COUNTY OF SANTA CLARA *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of California

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

A group of California counties and cities retained outside plaintiffs' law firms on a contingency fee basis to prosecute this public nuisance suit against companies that made or sold lead paint pigments more than thirty years ago. The civil prosecution is brought "in the name of the People of the State of California" and seeks abatement of lead paint from hundreds of thousands of public and private buildings in California at a potential cost of billions of dollars. Under the contingency fee retainer agreements upheld by the California Supreme Court, the government entities agreed to pay the plaintiffs' lawyers 17 percent of any recovery if they win the case, but nothing if they lose.

The question presented is whether contingency fee prosecutors' direct, personal, and substantial pecuniary interest in the outcome of a civil government prosecution seeking to vindicate sovereign interests violates the Due Process Clause of the Fourteenth Amendment.

PARTIES TO THE PROCEEDING BELOW

Pursuant to Rule 14.1(b), the parties to the proceeding in the Supreme Court of California were:

Defendants Atlantic Richfield Company, American Cyanamid Company, ConAgra Grocery Products Company, E.I. du Pont de Nemours and Company, NL Industries, Inc., Sherwin-Williams Company, and Millennium Holdings LLC; and

Plaintiffs County of Santa Clara, County of San Mateo, County of Monterey, County of Solano, County of Los Angeles, County of Alameda, City and County of San Francisco, City of Oakland, City of Los Angeles, and City of San Diego.

Pursuant to Rule 12.6, petitioners state their belief that Millennium Holdings LLC has no interest in the outcome of the petition. Petitioners have served this notice to counsel for Millennium Holdings LLC.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6, petitioners state as follows:

Petitioner Atlantic Richfield is a wholly owned subsidiary of BP America, Inc., which is a wholly owned subsidiary of BP Holdings North America Limited. BP Holdings North America Limited is a wholly owned subsidiary of BP p.l.c., which is a publicly held company. Neither Atlantic Richfield Company nor any of its direct or indirect parent companies other than BP p.l.c. is publicly held.

Petitioner American Cyanamid Company, now known as Wyeth Holdings Corporation, is a wholly-owned subsidiary of Wyeth LLC. Wyeth LLC is a wholly-owned subsidiary of Pfizer Inc. and the shares of Pfizer Inc. are publicly traded.

Petitioner ConAgra Grocery Products Company is a wholly owned subsidiary of ConAgra Foods, Inc. No publicly owned corporation owns more than 10% of ConAgra Grocery Products Company or ConAgra Foods, Inc.

Petitioner E.I. du Pont de Nemours and Company has no parent corporation and no publicly held company owns 10% or more of its stock.

Petitioner NL Industries, Inc. is a publicly traded corporation that is not a wholly owned subsidiary of any parent corporation. Valhi, Inc., is a publicly-traded company that owns more than 10% of NL Industries, Inc.'s common stock.

Petitioner Sherwin-Williams Company has no parent corporation and no publicly held company owns 10% or more of its stock.

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OPINIONS BELOW

The opinion of the Supreme Court of California is reported at 235 P.3d 21. Pet. App. 1a. The opinion of the California Court of Appeal is reported at 74 Cal. Rptr. 3d 842. Pet. App. 44a. The decision of the trial court is available at 2007 WL 1093706. Pet. App. 84a.

JURISDICTION

The Supreme Court of California entered judgment on July 26, 2010. Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution states in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

U.S. Const. amend. XIV, § 1.

INTRODUCTION

"If I don't bring the lead paint industry to its knees in three years, I will give them my boat." So said one of the plaintiffs' lawyers in this case, Ronald L. Motley, in 1999 to the Dallas Morning News. As later reported, the Motley law firm began its campaign against the industry by persuading the Rhode Island attorney general's office to hire the law firm to bring a public nuisance action, with the agreement that the firm would get 16.7 percent of any proceeds it recovered. Joe Nocera, *The Pursuit of Justice or Money?*, N.Y. Times, Dec. 8, 2007, at C1. The Motley firm and other prominent plaintiffs' lawyers then "raced all over the country, trying to get other jurisdictions interested in suing the same defendants on the same grounds." *Id.* And so began the present case.

In this case and others like it across the nation, plaintiffs' lawyers offered the same deal: a prepackaged, plaintiff-lawyer-concocted lawsuit that they would fund at "no cost" to the government in exchange for a direct and substantial financial stake in the putatively government-brought litigation. Here, some of the largest counties and cities in California agreed to give the Motley law firm and other plaintiffs' lawyers 17 percent of the potentially billions of dollars sought in this public nuisance

action brought "on behalf of the People of the State of California." C.A. App. 87.

Since the 1980s, California courts—relying on this Court's due process jurisprudence—had found such arrangements categorically barred as antithetical to fair process and a threat to the public's confidence in the integrity of the judicial system. Meanwhile, in other jurisdictions, such arrangements flourished, as contingency fee lawyers brought suits on behalf of state and local governments seeking to vindicate sovereign interests against the lead pigment, pharmaceutical, poultry, and gun industries, among others. Today, these contingency fee arrangements are the subject of a national controversy and have been condemned by the Executive Branch, Congress, former state attorneys general, public prosecutors, and academics.

Nevertheless, the California Supreme Court's decision gives a green light to the government's use of contingency fee prosecutors, so long as the plaintiffs' firms recite in their retainer agreements that government staff lawyers "control" the litigation. Pet. App. 27a-39a.

Adding boilerplate language does not change the fact that these contingency fee arrangements create "a conflict of interest that potentially places [lawyers'] personal interests at odds with the interests of the public" whom they purport to represent. *Id.* at 26a. Nor does such language remove the gross appearance of impropriety when the government delegates its sovereign police powers to plaintiffs' lawyers in exchange for a bounty based on the amount of money they can extract from the defendants. This Court should grant review to resolve a question that is central to the integrity of the judicial

process and exceptionally important as this brand of lawyer-sponsored government litigation becomes a cottage industry.

STATEMENT

I. The Government Public Nuisance Prosecution

1. *The Complaints.* In late 1999 or early 2000, the County Counsel for Santa Clara County "read about the Rhode Island lead paint case and thought Santa Clara might have similar claims against the lead industry." C.A. App. 428. Soon thereafter, in February 2000, the County's board approved filing this lawsuit and hiring the Cotchett, Pitre and McCarty firm to represent the County. *Id.* at 429.

In the retainer agreement, the County agreed to pay the Cotchett firm 17 percent of any recovery if the lawyers prevailed. *Id.* at 243. But if they lost, the County would pay no costs other than $150,000 seed money it provided to get the suit started. *Id.* The retainer agreement also provided, until recently, *see id.* at 429, that the County would cede control of the litigation to its contingency fee lawyers:

> Cotchett is given absolute discretion in the decision of who to sue and who not to sue, if anyone, and what theories to plead and what evidence to present.

Id. at 246.

In March 2000, the Cotchett firm filed a putative class action against eight companies that lawfully made and sold lead paint pigments many decades ago, alleging that the companies had "misrepresented and concealed the health hazards connected with lead paint." C.A. Supp. App. 827 ¶ 1. The County asserted claims for strict product liability, negligence,

fraud, indemnity, unfair business practices, and unjust enrichment. *Id.* at 850-58. The complaint sought compensatory and punitive damages, disgorgement of profits, attorneys' fees, and other relief. *Id.* at 858-59.

Within a few months, other government entities joined the suit. The first amended complaint, filed in September 2000, added as plaintiffs Santa Cruz, Solano, and Alameda Counties. 1st Am. Compl. ¶¶ 7-9. Each of these government entities agreed to pay the Cotchett firm 17 percent of any recovery if the lawyers won, but nothing if they lost. Their retainer agreements also gave the contingency fee prosecutors "absolute discretion" over the litigation. C.A. App. 276, 285, 304.

Over the next year, additional governments signed on to the lawsuit. The second and third amended complaints brought new claims for public and private nuisance and added as plaintiffs the City of Oakland and three local agencies; the County of Kern; and the Santa Clara County District Attorney. 2d Am. Compl. ¶¶ 10-13, 163-80; 3d Am. Compl. Caption, ¶¶ 2, 8-15. Several of the entities executed retainer agreements giving the Cotchett firm 17 percent of any recovery and "absolute discretion" over the litigation. C.A. App. 291, 297.

The City and County of San Francisco also joined the suit, but they were represented by Motley Rice LLP and additional outside counsel. At that time, Motley Rice "actively represented" Rhode Island in its public nuisance action against petitioners. *Id.* at 483. Motley Rice also represented "26 cities and counties in New Jersey and six cities in Ohio, each of which have filed public nuisance actions against these same defendants." *Id.* San Francisco's retainer

agreements appointed Motley Rice and its co-counsel as "Special Assistant City Attorneys," gave them 17 percent of any recovery, and agreed that the outside lawyers would pay all litigation costs. *Id.* at 230, 232. These agreements also stated that San Francisco retained authority over the litigation. *Id.* at 230.

The trial court dismissed the public nuisance claim on the ground that products liability claims in the guise of public nuisance are not cognizable. The court also granted petitioners summary judgment on the private tort claims as time-barred. *See* Pet. App. 3a. The government entities appealed, and the California Court of Appeal reversed. *See id.*; *County of Santa Clara v. Atlantic Richfield Co.*, 40 Cal. Rptr. 3d 313, 348 (Cal. Ct. App. 2006). The court reinstated the governments' public nuisance claim as well as their fraud, negligence, and strict liability causes of action. *Santa Clara*, 40 Cal. Rptr. 3d at 348. The court found that the public nuisance claim was "not a disguised version of plaintiffs' products liability causes of action" because the government entities were "*not* seeking *damages* for injury to *their* property or the cost of remediating *their* property." *Id.* at 328-29 (emphasis in original). Rather, "the representative cause of action is a public nuisance action brought *on behalf of the People seeking abatement*" of lead paint from properties throughout California. *Id.* at 328 (emphasis in original).

Although the appellate court reinstated many of the private tort claims, the governments' fourth amended complaint asserted public nuisance as the sole claim and sought abatement as the sole remedy. Pet. App. 3a.; C.A. App. 108-10, 821-22. The fourth amended complaint dropped several government

entities but added Monterey and San Mateo Counties, and the City of San Diego. The retainer agreements with these new plaintiffs provided for a 17 percent contingency fee with outside counsel covering all litigation costs. As for control of the case, one agreement gave the Cotchett firm "absolute discretion," C.A. App. 314, while others stated that government lawyers retained "final authority." *Id.* at 335; *see also id.* at 455. The fourth amended complaint also added the City of Los Angeles and the County of Los Angeles, which are not represented by outside counsel. Pet. App. at 3a n.1; C.A. App. 475.

2. *The Proceedings to Bar Contingency Fees.* After the government entities limited their case to a public nuisance prosecution, the companies moved to bar the governments from paying their lawyers a contingency fee based on the outcome of the case. C.A. App. 119-38. The companies did not dispute that the government entities could retain the contingency fee lawyers to assert *proprietary* claims. *See, e.g., id.* at 727. But the governments now asserted purely sovereign claims and the lawyers performed a *prosecutorial* role in pursuing a quasi-criminal public nuisance action. The companies thus asserted that giving the contingency fee prosecutors a direct, personal, and substantial financial stake in the success of the case was contrary to *People ex rel. Clancy v. Superior Court*, 705 P.2d 347 (Cal. 1985), and the federal due process principles embodied therein.

In response, the governments submitted declarations stating that, notwithstanding any agreements to the contrary, they had retained control of the litigation. Pet. App. 5a. Some of the entities that had given "absolute discretion" to the contingency fee

prosecutors "disclaimed" their retainer agreements and asserted that they had amended or would amend the agreements. *Id.*; *see also* C.A. App. 405-86. The governments further stated that they lacked the financial resources, staff, and expertise to pursue their claim absent contingency fee agreements with the plaintiffs' firms, notwithstanding that the combined entities have multi-billion dollar annual budgets and large legal departments staffed with hundreds of government lawyers. Pet'rs' Cal. Ct. App. Br. at 50-51 nn. 14-15 (July 30, 2007).

II. State Court Decisions Below

In April 2007, the trial court granted the companies' motion to preclude the governments' payment of contingency fees. Pet. App. 88a-89a. The trial court held that such contingency fee arrangements are "antithetical to the standard of neutrality that an attorney representing the government must meet when prosecuting a public nuisance abatement action." *Id.* at 86a (quoting *Clancy*, 705 P.3d at 353). The court also found that "[o]versight by the government attorneys does not eliminate the need for or requirement that outside counsel adhere to the standard of neutrality." *Id.* at 87a. "Given the inherent difficulties of determining whether or to what extent the prosecution of this nuisance action might or will be influenced by the presence of outside counsel operating under a contingent fee," the arrangement was improper. *Id.*

The California Court of Appeal vacated the trial court's order, holding that public entities may "engag[e] private counsel under a contingent fee arrangement . . . so long as the public entities' in-house counsel retain control over all decision-making." *Id.* at 63a.

The California Supreme Court upheld the contingency fee arrangements on the condition that the retainer agreements recite that government lawyers have control over the lawyers who stand to benefit financially from the prosecution. *Id.* at 38a. The court acknowledged that the contingency fee prosecutors "have a conflict of interest that potentially places their personal interests at odds with the interests of the public and of defendants in ensuring that a public prosecution is pursued in a manner that serves the public, rather than serving a private interest." *Id.* at 26a.

The court further recognized that its prior decision in *Clancy*, which relied on this Court's due process decisions, "arguably supports defendants' position favoring a bright-line rule barring any attorney with a financial interest in the outcome of a case from representing the interests of the public in a public-nuisance abatement action." *Id.* at 2a. The court nonetheless found that a contingency fee prosecution here would not deprive the defendants of their constitutional right to fundamentally fair procedures.

First, the court observed that "due process would not allow for a criminal prosecutor to employ private co-counsel pursuant to a contingent-fee arrangement that conditioned the private attorney's compensation on the outcome of the criminal prosecution." *Id.* at 15a n.7. But the court found that such a liberty interest is not implicated where, as here, "the statute of limitations on any criminal prosecution has run and there is neither a threat nor a possibility of criminal liability being imposed upon defendants." *Id.* at 22a.

Second, the court held that the need for a disinterested prosecutor in this case is lowered because petitioners are "large corporations with access to abundant monetary and legal resources." *Id.* at 23a. Thus, any concern "about the misuse of governmental resources against an outmatched individual defendant is not implicated in the present case." *Id.* at 24a. The need for a disinterested prosecutor also is lowered, the court reasoned, because this case does not involve "any First Amendment right or any other liberty interest" and "will not result in an injunction that prevents the defendants from continuing their current business operations." *Id.* at 22a.

Third, the court reasoned that "control of the litigation by neutral attorneys provides a safeguard against the possibility that private attorneys unilaterally will engage in inappropriate prosecutorial strategy and tactics geared to maximize their monetary award." *Id.* at 33a-34a. The court sought to implement this supposed safeguard by setting forth several specific provisions that must be included in the contingency fee retainer agreements. *Id.* at 37a. The court reversed and remanded so that the government entities and the contingency fee prosecutors could revise their retainer agreements to include the provisions for control outlined by the court. *Id.* at 39a.

REASONS FOR GRANTING THE WRIT

Due process demands that before a State deprives a person of property, the judicial procedures leading to that deprivation must be fundamentally fair. In the decision below, however, the California Supreme Court held that contingency fee lawyers could prosecute this public nuisance action seeking to impose billions of dollars in abatement costs on petitioners. In other words, the more liability the prosecutors

seek to impose in this public prosecution, the more they stand to receive as a bounty at the end of the case.

The court below reached that remarkable result on the theory that contingency fee arrangements can provide for disinterested government lawyers to retain ultimate control over the litigation. That analysis does not withstand scrutiny. Under the Due Process Clause, a public prosecutor could not be paid a bounty for prosecuting a civil or criminal case as long as his supervisor was paid on a salary basis. Nor could a private attorney receive a contingency fee for prosecuting a criminal case as long as a government attorney had ultimate decision-making power in the case. There is no principled reason for a different outcome here. And even assuming the fiction that government control could neutralize the contingency fee prosecutors' structural conflict of interest, the arrangement creates an untenable appearance of impropriety that diminishes faith in the fairness of our civil justice system.

I. A PUBLIC NUISANCE ACTION PROSECUTED BY CONTINGENCY FEE LAWYERS VIOLATES DUE PROCESS

A. Due Process Bars A Prosecutor From Having A Substantial Financial Stake In A Case

This Court has long held that due process forbids any arrangement whereby an extraneous influence could compromise a government actor's ability faithfully to discharge his or her duties in the judicial system. *See, e.g.*, *Tumey v. Ohio*, 273 U.S. 510, 523-24 (1927). Thus, the Court has struck down schemes where a pecuniary or other improper interest could

undermine a judge's impartiality, *see id.*, or might distort a criminal or civil prosecutor's duty to put justice over personal interests. *See Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 810 (1987) (plurality opinion); *see also Marshall v. Jerrico, Inc.*, 446 U.S. 238, 249-50 (1980). The prohibition against such structural conflicts of interest "preserves both the appearance and reality of fairness, generating the feeling, so important to a popular government, that justice has been done." *Marshall*, 446 U.S. at 242 (citations and internal quotation marks omitted). The contingency fee arrangements here blatantly violate both the "appearance and reality," *id.*, of fairness required by this Court's jurisprudence.

1. In the context of judges, this Court long has recognized the "controlling principle" that any "'procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.'" *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2260 (2009) (quoting *Tumey*, 273 U.S. at 532). In the path-marking *Tumey* decision, the Court reversed convictions rendered by a village mayor whose neutrality was jeopardized because he was paid a portion of the criminal fines he imposed as a judge, whereas he received no compensation for judgments of acquittal, 273 U.S. at 520, and because other sums from the fines were deposited into the village's treasury for improvements and repairs. *Id.* at 521.

The Court held that "it certainly violates the Fourteenth Amendment and deprives a defendant in a

criminal case of due process of law to subject his liberty or property to the judgment of a court, the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case." *Id.* at 523. The mayor was thus disqualified from judging cases "both because of his direct pecuniary interest in the outcome, and because of his official motive to convict and to graduate the fine to help the financial needs of the village." *Id.* at 535. The Court rejected the contention that the judge received only a modest sum of $12 from the fine, declining to "regard the prospect of receipt or loss of such an emolument in each case as a minute, remote, trifling, or insignificant interest." *Id.* at 532.

Similarly, in *Ward v. Village of Monroeville, Ohio*, 409 U.S. 57, 59 (1972), this Court invalidated a procedure whereby funds produced from a mayor's court accounted for a substantial portion of municipal revenues, even though the mayor's salary was not paid from those sums. The Court reasoned that the "possible temptation" forbidden by due process was present "when the mayor's executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor's court." *Id.* at 60. The Court distinguished situations where the extraneous influence was "too remote to warrant a presumption of bias toward conviction in prosecutions before [the] judge." *Id.* at 61; *see also Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 824 (1986) (due process barred a state high court judge from participating in a civil case nearly identical to the judge's own lawsuit); *Marshall*, 446 U.S. at 243 n.2 (collecting cases); *cf. Caperton*, 129 S. Ct. at 2265 (due process barred a state high court judge from participating in a suit against a company run by the judge's largest campaign contributor).

2. In the context of prosecutors, this Court likewise has held that an arrangement that would put a prosecutor's personal interest ahead of his public duty to seek justice is fundamentally unfair. While prosecutors need not have the same degree of impartiality as judges, *see Marshall*, 446 U.S. at 248, prosecutors serve a unique function in the judicial process as "both an administrator of justice and an advocate." *United States v. Young*, 470 U.S. 1, 9 n.6 (1985) (citation and internal quotation marks omitted). A prosecutor is "the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all." *United States v. Berger*, 295 U.S. 78, 88 (1935). As such, a prosecutor's interest is not that the government "shall win a case, but that justice shall be done." *Id.*; *see also Brady v. Maryland*, 373 U.S. 83, 88 n.2 (1963) ("[T]he government wins its point when justice is done in its courts." (internal quotation marks omitted)).[1]

It is antithetical to our system of justice to permit a criminal or civil prosecutor to have a personal stake in a public prosecution that might prevent the proper exercise of the prosecutor's official duty to seek justice and to further the public interest. In *Young*, for instance, the Court "establish[ed] a categorical rule against the appointment of an interested prose-

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[1] *See also, e.g.*, *Strickler v. Greene*, 527 U.S. 263, 281 (1999) (describing "the special role played by the American prosecutor in the search for truth in criminal trials"); *Gannett Co. v. DePasquale*, 443 U.S. 368, 384 n.12 (1979) ("The responsibility of the prosecutor as a representative of the public . . . requires him to be sensitive to the due process rights of a defendant to a fair trial.").

cutor" to pursue a criminal contempt action on behalf of the government. 481 U.S. at 814. There, the defendant in a civil case was charged with criminal contempt, and the judge appointed the plaintiff's private lawyer as a special prosecutor to pursue the charge. *Id.* at 790-92. Finding the appointment improper, the Court stated that "[p]rivate attorneys appointed to prosecute a criminal contempt action represent the United States" and are "appointed solely to pursue the public interest in vindication of the court's authority." *Id.* at 804. Thus, they "should be as disinterested as a public prosecutor who undertakes such a prosecution." *Id.* Because the private lawyer "may be tempted to bring a tenuously supported prosecution if such a course promises financial or legal rewards for the private client," the arrangement was improper. *Id.* at 805.

Similarly, this Court in *Marshall*, which involved a civil enforcement action, held that "[a] scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions." 446 U.S. at 249-50. The Court observed that civil prosecutors, while they do not have the identical duties of judges, nonetheless "are also public officials; they too must serve the public interest." *Id.* at 249 (citing *Berger*, 295 U.S. at 88). Accordingly, due process imposes "limits on the partisanship of [such] prosecutors." *Id.*

The California Supreme Court glossed over these due process principles and the inherent risks of allowing a prosecutor to have a financial stake in the case.

B. A Contingency Fee Arrangement Interferes With A Prosecutor's Duty To Act Solely In The Public Interest

1. This case is a paradigmatic example of the type of government prosecution that the Court's due process jurisprudence forbids. Plaintiffs' lawyers brought and are pursuing this action in furtherance of purely private ends—because they "calculated" that "the possible reward" outweighed "the financial risk." Pet. App. 31a n.13. It violates due process for that type of personal financial calculation to fuel a public nuisance action brought in the government's sovereign capacity and imbued with important public health issues.

Contingency fee prosecutors have incentives that, under any "realistic appraisal of psychological tendencies and human weaknesses," *Marshall*, 446 U.S. at 252 (citation omitted), create a structural conflict between the pursuit of justice, which is the obligation of all prosecutors, and their personal interest in obtaining a substantial financial recovery. Under the contingency fee agreements, the prosecuting attorneys are entitled to 17 percent of any recovery if they win, but nothing if they lose. This arrangement inherently skews their decision-making and smacks of impropriety and thus denies fundamental fairness at every stage of the governments' civil prosecution.

For example, this Court has recognized that a private lawyer appointed as a prosecutor "may be tempted to bring a tenuously supported prosecution if such a course promises [personal] financial . . . rewards." *Young*, 481 U.S. at 805. The lawyers who developed the public nuisance theory underlying this case reportedly described it as a "Wacky Idea," but

one that could be exceptionally profitable. *See* Brian C. Jones, *How the Lead Paint Case Was Won*, Boston Phoenix, Feb. 28, 2007. The results thus far bear out the tenuous nature of this prosecution: courts across the country have rejected public nuisance claims like the one here.[2]

Financial incentives to prosecute also may prompt government entities to bring prosecutions they would otherwise have no desire or incentive to pursue because existing legislative and regulatory remedies already adequately address the alleged public nuisance. A wide swath of federal and state laws have for decades addressed the hazards of lead paint, including providing funding and grants to state and local governments for remediation. These programs are regarded as a public health "success story." *See, e.g.*, Richard O. Faulk & John S. Gray, *Getting the Lead Out? The Misuse of Public Nuisance Litigation by Public Authorities and Private Counsel, Part 1 of 3*, 21 Toxics L. Rep. 1071, at 9 (Nov. 30, 2006); *accord id. Part 2 of 3*, 21 Toxics L. Rep. 1124, at 8-29 (Dec. 7, 2006) (detailing the pervasive regulation of lead and the success of regulatory efforts).

In the face of this public health triumph, this case would never have been brought were it not manufactured, sold, and funded by contingency fee lawyers solely for private gain. The governments in this case have multi-billion dollar budgets and large legal

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[2] *See Rhode Island v. Lead Indus. Ass'n*, 951 A.2d 428 (R.I. 2008) (rejecting public nuisance claim as a matter of law); *In re Lead Paint Litig.*, 924 A.2d 484 (N.J. 2007) (same); *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110 (Mo. 2007) (same); *City of Chicago v. Am. Cyanamid Co.*, 823 N.E.2d 126 (Ill. App. Ct. 2005) (same), *petition for leave to appeal denied*, 833 N.E.2d 1 (Ill. 2005).

staffs. *See supra* at 8. They did not, however, wish to expend public resources on this public action but rather opted for a no-risk, no-cost prosecution that could inflict billions of dollars of liability on an industry.

Beyond the threshold bias to invoke the government's police powers, a prosecutor's personal financial stake in a case improperly influences the myriad of strategic and tactical decisions made during the course of a longstanding prosecution. For instance, lawyers working on a contingency fee have powerful financial incentives to name as defendants large companies—as they have done here—because smaller companies would contribute less to any fees. *See Marshall*, 446 U.S. at 250 n.12 (due process considerations are heightened if "the alleged biasing influence contributed to prosecutions against particular persons"). Thus, the County Counsel for Santa Clara, which filed the initial complaint in this action, left the identification of all defendants to contingency fee lawyers. C.A. App. 429.

The inherent conflict of interest posed by contingency fee agreements infects other purely sovereign decisions. Contingency fee prosecutors have the incentive to seek monetary relief even if the public interest may be "better served by foregoing monetary claims, or some fraction of them, in return for non-monetary concessions." David A. Dana, *Public Interest and Private Lawyers: Toward a Normative Evaluation of* Parens Patriae *Litigation by Contingency Fee*, 51 DePaul L. Rev. 315, 323 (2001). Here, the contingency fee prosecutors initially focused for years on private tort claims seeking compensatory and punitive damages before abandoning those claims to

pursue a "common fund" for public nuisance abatement. C.A. App. 111, 850-59.

Similarly, contingency fee agreements incentivize prosecutors to seek relief that may actually be contrary to the public interest. The government entities in this case seek the extreme remedy of abating lead paint in all buildings everywhere, even though removal of intact paint may actually *increase* the risk of elevated blood lead levels in children and is in conflict with federal and state regulatory regimes. *See* Ctrs. for Disease Control & Prevention, *Managing Elevated Blood Lead Levels Among Young Children: Recommendations from the Advisory Committee on Childhood Lead Poisoning Prevention* 21 (Mar. 2002); California Childhood Lead Poisoning Prevention Act of 1991, Cal. Health & Safety Code §§ 105275-105310 & 17920.10 (making lead hazards illegal, setting forth procedures for state, county, or municipal agencies to remediate lead hazards, and providing funding for enforcement).

And contingency fee agreements inevitably affect the decision whether to continue a prosecution. The interests of the public may warrant dropping a prosecution where, as here, the underlying theory has been discredited and there are vast regulatory remedies and funding available to address the alleged nuisance. "But it is hard to imagine contingency fee lawyers advocating to drop a case, as doing so would leave them without any compensation for their work." Dana, *supra*, at 326.

C. The Government's Nominal Control Over Contingency Fee Counsel Does Not Cure The Taint Of Financially Interested Civil Prosecutors

The California Supreme Court acknowledged that the prosecutors' contingency fee arrangements create "a conflict of interest that potentially places [their] personal interest at odds with the interests of the public and of defendants in ensuring that a public prosecution is pursued in a manner that serves the public, rather than serving a private interest." Pet. App. 26a. The California Supreme Court nonetheless held that such arrangements were fair if they recite that government staff counsel retain ultimate control over all "critical discretionary decisions," such as the decision to settle the case, and that the supervising government counsel personally "oversee[] the litigation." *Id.* at 27a, 37a. That analysis does not withstand scrutiny.

A disinterested lawyer's control over a conflicted prosecutor does not alter the *structural* nature of the due process violation: a conflicted lawyer is prosecuting a case on behalf of a sovereign. The government could not pay a government staff prosecutor a substantial contingency fee for prosecuting a civil or criminal case so long as his government supervisor was paid on a salary basis. Nor could the government pay a contingency fee to a private lawyer appointed as a special criminal prosecutor so long as a government attorney had ultimate decision-making power in the case. There is no meaningful distinction between those examples and this case. In all instances, the conflict infects how the financially interested prosecutor thinks, acts, and makes recom

mendations to his client. And in all instances, the conflict creates an appearance of impropriety that undermines the public's confidence in the judicial process.

1. The California Supreme Court's reliance on nominal control by government counsel ignores a conflicted lawyer's pervasive influence over the course of a prosecution. The court fundamentally mischaracterized the contingency fee prosecutors as performing a "subsidiary" or "subordinate" role. *Id.* at 27a, 28a, 32a. The contingency fee prosecutors are the skilled architects, developers, and journeymen of this massive litigation. It is fanciful to pretend that they could function as puppets controlled by counsel who hired them given that they lacked the "necessary" expertise and resources to prosecute the case by themselves. *See* C.A. App. 411, 453, 459; *see also id.* at 407, 427, 448, 453, 456, 475.

The court did not, and as a practical matter could not, bar the conflicted contingency fee prosecutors from advising the salaried supervising prosecutors in making uniquely sovereign decisions about the litigation. As the trial court that presided over these lawyers for several years recognized, the contingency fee prosecutors "are not just a mouth piece [or] a potted plant"; those prosecutors are "providing [the] litigation in the courtroom[,] presenting [and] gathering the evidence . . . [and] all the work that you would do in any case." *Id.* at 812, 814. The California Supreme Court's theory of government control is illusory.

This Court in *Young*, moreover, held that attempting to ascertain any improper effects of an interested prosecutor is a fruitless enterprise:

> Appointment of an interested prosecutor is . . . an error whose effects are pervasive. Such an appointment calls into question, and therefore requires scrutiny of, the conduct of an entire prosecution, rather than simply a discrete prosecutorial decision. Determining the effect of this appointment thus would be extremely difficult. A prosecution contains a myriad of occasions for the exercise of discretion, each of which goes to *shape* the record in a case, but few of which are *part* of the record.

481 U.S. at 812-13 (emphasis in original); *see also id.* at 807 (a prosecutor's "decisions, critical to the conduct of a prosecution, are all made outside the supervision of the court"); *cf. United States v. Gonzalez-Lopez*, 548 U.S. 140, 150-51 (2006) (recognizing it would be virtually "impossible" to detect what subtle differences result from a particular lawyer's involvement in a case).

The decision below is premised on the inherently futile exercise of trying to determine the indeterminable, *i.e.*, the effect of the structural conflict on the lawyer's actions in the proceeding. Indeed, the trial court below recognized the perils of trying to determine "whether the government attorneys have been exercising . . . control throughout the litigation or whether they have passively or blindly accepted recommendations, decisions, or actions by outside counsel." Pet. App. 80a.

Even if it were possible to ferret out the bounds of "control," the attorney-client privilege presents significant obstacles. Petitioners sought discovery regarding the government lawyers' control, but the government entities withheld such information as privileged. Pet. App. 35a n.15; C.A. App. 384-85.

Boilerplate language reciting control by government attorneys does not cure an otherwise improper and fundamentally unfair procedure. In *Ward*, this Court rejected the argument that procedures allowing a financially interested judge to decide cases could be remedied by the "procedural safeguard" of a *de novo* trial or an appeal. 409 U.S. at 61. The Court held that due process requires an impartial adjudication "in the first instance." *Id.* at 62. Fair procedures in the first instance mean a prosecution staff consisting entirely of lawyers without a substantial financial stake in the outcome of a public proceeding.

2. Even indulging in the fiction that government control could neutralize the contingency fee prosecutors' structural conflict of interest, the "appointment of an interested prosecutor creates an appearance of impropriety that diminishes faith in the fairness of the criminal justice system." *Young*, 481 U.S. at 811. Thus, in *Young,* the Court found it irrelevant whether such an appointment caused actual harm, for "what is at stake is the public perception of the integrity of our criminal justice system." *Id.*; *accord id.* at 813 ("Public confidence in the disinterested conduct of [a prosecutor] is essential.").

Contingency fee prosecutors threaten to diminish the public's faith in the fairness of civil government prosecutions. These arrangements frequently result in allegations that government officials are doling out contingency fee agreements to lawyers who make substantial campaign contributions. *See* Editorial, *The State Lawsuit Racket: A Case Study in the Politician-Trial Lawyer Partnership*, Wall St. J., Apr. 8, 2009, at A12 (reporting that named partner of a firm pursuing a contingency fee contract with Pennsylvania made substantial campaign contributions);

Editorial, *The Pay-to-Sue Business: Write a Check, Get a No-bid Contract to Litigate for the State*, Wall. St. J., Apr. 16, 2009, at A14 (same for Mississippi, New Mexico, Louisiana, and Arkansas government officials who awarded contingency fee contracts). Similarly, there is a "growing perception that the contingency agreements are simply a way for state attorneys general to reward their political backers." John Beisner et al., *Bounty Hunters on the Prowl: The Troubling Alliance of State Attorneys General and Plaintiffs' Lawyers*, Institute for Legal Reform, at 7 (2005).

The public also perceives the contingency fee agreements as giving lawyers an undue windfall at taxpayers' expense. *See, e.g.*, Adam Liptak, *A Deal for the Public: If You Win, You Lose*, N.Y. Times, July 9, 2007, at A10 (reporting controversy over government agreement to give contingency fee lawyers half of any recovery in public environmental suit against poultry companies). As Judge William H. Pryor of the Eleventh Circuit Court of Appeals, then Attorney General of Alabama, aptly explained:

> The use of contingency-fee contracts allows government lawyers to avoid the appropriation process; it creates the illusion that the lawsuits are being pursued at no cost to the taxpayers. These contracts also create the potential for outrageous windfalls or even outright corruption for political supporters of the officials who negotiated the contracts.

William H. Pryor, *Government "Regulation by Litigation" Must Be Terminated*, Legal Backgrounder, May 18, 2001, at 4. One need only search 'government contingency fee' on the Internet to grasp the public outrage over these arrangements.

3. The lower court's remand directing the government entities to modify their contingency fee agreements to include control provisions does not justify delaying this Court's review or render the judgment not final. *See Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975). As discussed, control is illusory, impractical, and unascertainable, and does not remove a seriously conflicted contingency fee prosecutor from the prosecution team. As such, proceedings on remand will not sharpen the issues for this Court's consideration.

Likewise, there is no need on remand to attempt to delve into the nature and extent of the harm to petitioners. *See Gonzalez-Lopez*, 548 U.S. at 149 n.4 (harmless error analysis is inapplicable to assess the effect on a case by an attorney's representation); *Young*, 481 U.S. at 813 (harmless error review is inapplicable when prosecutor is tainted by a conflict of interest). The federal issue has been finally decided and the federal constitutional question is squarely presented at this juncture. *Cox Broad. Corp.*, 420 U.S. at 480-82. There is accordingly no basis for permitting the case to continue violating the companies' due process rights and undermining the public's confidence in our civil justice system.

D. The California Supreme Court's Reasoning Aggravates The Due Process Violation

The court below also relied on a number of factors in this case that, in the court's view, minimized the due process interests at stake and justified permitting financially interested lawyers to prosecute this case. The court's reasoning is either without merit or exacerbates the denial of due process.

1. While recognizing that "due process would not allow for a criminal prosecutor to employ private [contingency fee] co-counsel," Pet. App. 15a n.7, the court found it significant that "there is neither a threat nor a possibility of criminal liability being imposed upon defendants." *Id.* at 22a. But there is no less need for a disinterested prosecutor simply because a procedural barrier exists to pursuing criminal remedies in an action brought on behalf of "the People." C.A. App. 88; Cal. Civ. Proc. Code § 731.

This Court has recognized that public nuisance is "akin to a criminal prosecution." *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 604 (1975); *see also Tull v. United States*, 481 U.S. 412, 421 (1987); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 487 (1987); *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907). In any event, the salient factor is that a public nuisance action is brought on behalf of the sovereign. *People ex rel. Gallo v. Acuna*, 929 P.2d 596, 604-05 (Cal. 1997) (tracing history of uniquely sovereign nature of California's public nuisance action).

Contingency fee *prosecutors* who vindicate purely sovereign interests fundamentally differ from contingency fee counsel who represent the government asserting a proprietary claim that a private plaintiff could bring. *See, e.g., City and County of San Francisco v. Philip Morris, Inc.*, 957 F. Supp. 1130 (N.D. Cal. 1977). This is not such a claim. "A public nuisance abatement action must be prosecuted by a government entity and may not be initiated by a private party." Pet. App. 22a.

2. Not only did the court below trivialize petitioners' due process interests at stake, the court held that

the companies' size and wealth somehow gave them *less* due process rights. The court observed that the "[d]efendants are large corporations with access to abundant monetary and legal resources," and consequently the court believed that this case did not pose a threat of "the misuse of governmental resources against an outmatched individual." *Id.* at 23a-24a.

It is offensive to our Constitution to hold that due process rights decrease as the size and wealth of a person increases. "[T]he wealth of a defendant cannot justify . . . otherwise unconstitutional" procedures. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 428 (2003); *see also BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 585 (1996) ("The fact that BMW is a large corporation rather than an impecunious individual does not diminish its entitlement to [due process]."). Any reliance on petitioners' wealth to relax the due process standard was thus improper and exacerbated the due process violation.

3. The court also reasoned that this public nuisance action does not "prevent defendants from exercising any First Amendment right or any other liberty interest" or "result in an injunction that prevents the defendants from continuing their current business operations." Pet. App. 22a. Again, those factors are irrelevant to the due process inquiry whether fundamentally unfair procedures may deprive the companies of their fully protected property rights. In *Tumey*, the Court found a due process violation when the mayor-judge received $12 from a $100 fine imposed on a defendant. 273 U.S. at 532. The property interests here are substantially greater. The governments seek abatement of lead paint from all public and private buildings throughout California that could cost billions of dollars.

II. THE QUESTION PRESENTED WARRANTS THIS COURT'S IMMEDIATE REVIEW

A. The Validity Of Contingency Fee Arrangements In Sovereign Actions Is An Issue Of Recurring And Exceptional Importance

This case raises a recurring issue of far-reaching national importance involving the fairness of, and public confidence in, our civil justice system. Whether a civil prosecutor's pecuniary interest in a case violates due process has been a recurring issue in this Court. *See Marshall*, 446 U.S. 238; *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust of S. Cal.*, 508 U.S. 602, 620 n.12 (1993). In *Marshall*, however, the Court had no occasion to calibrate "with precision what limits there may be on a financial or personal interest of one who performs a prosecutorial function," because the potential interest of the civil prosecutor in that case was "exceptionally remote." 446 U.S. at 250. In *Concrete Pipe*, the Court again declined to precisely define those limits because the issue was not properly presented. 508 U.S. at 620 n.12. More broadly, this Court's recent decisions reflect that cases involving the fundamental fairness and integrity of the judicial system merit plenary review. *See Caperton*, 129 S. Ct. at 2265-67.

This case presents a full and ideal context in which to consider the due process limitations on financially interested civil prosecutors. The case was conceived by contingency fee lawyers, sold as a risk-free opportunity for state and local governments, and has dragged on for a decade with little to show other than the imposition of substantial litigation costs and administrative burdens on the companies targeted by outside counsel.

The remedy sought in this case further illustrates the enormous potential for abuse, as the government entities seek abatement of lead paint from literally hundreds of thousands of buildings in California at a potential cost of billions of dollars, without regard to the public health consequences of that approach or the possible adverse effect of abatement on building owners. *See supra* pp. 16-17.

Review is particularly warranted here in light of the recent explosion of contingency fee arrangements with government entities. "[T]rial lawyers representing public clients on contingency fee are suing businesses for billions over matters as diverse as prescription drug pricing, natural gas royalties and the calculation of back tax bills." Martin Redish, *Private Contingent Fee Lawyers and Public Power: Constitutional and Political Implications*, Research Roundtable, Northwestern Law School, at 7 (2008) (quoting Walter Olson, *Tort Travesty*, Center for Legal Policy (2007)). Such arrangements will become even more prevalent given that, at the behest of trial lawyer associations, federal statutes increasingly permit state attorneys general to enforce federal laws. *See* Victor Schwartz, *The Plaintiffs' Bar's Covert Effort to Expand the State Attorney General Federal Enforcement Power*, Legal Backgrounder, July 10, 2009, at 1.

In light of the increasingly prominent role of contingency fee lawyers in public prosecutions, this Court should clarify the due process limitations on such practices, which have confounded lower courts. The most notable example is the decision below. But the state high court in Rhode Island expressly noted the lack of clarity, while other courts have simply avoided the issue or invalidated similar agreements

on other grounds. *Rhode Island v. Lead Indus. Ass'n*, 951 A.2d 428, 475 n.50 (R.I. 2008) (permitting agreements in limited circumstances, but noting that "[g]iven the continuing dialogue about the propriety of contingent fee agreements in the governmental context, we expressly indicate that our views concerning this issue could possibly change at some future point in time"); *see also Commonwealth v. Janssen Pharm., Inc.*, 2 A.3d 474, 478 (Penn. 2010) (pharmaceutical company lacked statutory standing under state law to bring due process challenge to state's use of contingency fee lawyers in civil prosecution); *Meredith v. Ieyoub*, 700 So. 2d 478, 481 (La. 1997) (state attorney general's retention of contingency fee lawyers violated state constitutional separation of powers).

B. The Court's Intervention Is Necessary To Preserve Fairness And Public Confidence In Judicial Proceedings

Beyond the need for clarity on these recurring issues, review also is warranted because the question presented is exceptionally important to maintaining the integrity of the judicial process. Over a dozen organizations condemned the contingency fee arrangements here in *amicus* briefs below. And they are not alone in viewing such arrangements as antithetical to fundamental fairness in judicial proceedings.

The Executive Branch in 2007 banned the federal government from paying lawyers a contingency fee. *See Protecting American Taxpayers from Payment of Contingency Fees*, Exec. Order No. 13,433, 72 Fed. Reg. 28441 (May 16, 2007). This prohibition reflects the "policy of the United States" that the fees of

lawyers representing the government should never be "contingent upon the outcome of litigation." *Id.*

Congress also has recognized that it is wholly inappropriate for a federal government lawyer to participate where he or she has a financial interest in the outcome of a case. Under federal law, any federal officer or employee with a nontrivial "financial interest" in an adjudicative proceeding is barred from "participat[ing] personally and substantially" on behalf of the government, including by "the rendering of advice." 18 U.S.C. § 208(a). The criminal and civil penalties for violating this restriction include up to five years imprisonment and fines of up to "$50,000 for each violation or the amount of compensation which the person received or offered for the prohibited conduct, whichever amount is greater." *Id.* § 216(b). In addition, a few States limit the amount of contingency fees that government can pay to lawyers, and require transparency in the awarding of contingency fee government contracts. *See* Beisner et al., *supra*, at 9.

Former state attorneys general, too, have criticized the government's use of contingency fee lawyers. *See* Pryor, *supra*, at 4. And public prosecutors have recognized that these arrangements undermine the civil justice system. The California District Attorneys Association, which represents thousands of prosecutors throughout the state, explained in an *amicus* brief below that "[p]ermitting contingent fee attorneys to represent public law enforcement interests will necessarily and inevitably inject improper personal financial interests into the balancing process required in civil law enforcement cases and will undermine [public] confidence in the civil law enforcement justice system." Brief of Cal. Dist.

Attorneys Ass'n as Amicus Curiae Supporting Respondent, 2009 WL 1541982, at *3.

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"The function of the prosecutor . . . is not to tack as many skins of victims as possible to the wall [but rather] to vindicate the right of people as expressed in the laws." *Donnelly v. DeChristofo*, 416 U.S. 637, 648-49 (1974) (Douglas, J., dissenting). Paying a prosecutor a bounty based on the amount of money he or she can extract from a defendant injects impermissible factors and incentives into the process that cannot be cured by providing nominal—and unrealistic—government staff lawyer supervision over the financially interested lawyers. That is evident here where the contingency fee prosecutors admittedly brought this case not to pursue the public interest, but to "bring the lead paint industry to its knees." *See supra* p. 2. This Court should grant review to restore the "appearance and reality," *Marshall*, 446 U.S. at 242, of fairness that is demanded by this Court's jurisprudence and is necessary to ensure the public's confidence in the civil justice system.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

SUPREME COURT OF CALIFORNIA

No. S163681.

COUNTY OF SANTA CLARA *et al.*,
Petitioners,

v.

THE SUPERIOR COURT OF SANTA CLARA COUNTY,
Respondent;

ATLANTIC RICHFIELD COMPANY *et al.*,
Real Parties in Interest.

July 26, 2010.

GEORGE, C.J.

A group of public entities composed of various California counties and cities (collectively referred to as the public entities) are prosecuting a public-nuisance action against numerous businesses that manufactured lead paint (collectively referred to as defendants). The public entities are represented both by their own government attorneys and by several private law firms. The private law firms are retained by the public entities on a contingent-fee basis. After summary judgment was granted in favor of defendants on various tort causes of action initially advanced by the public entities, the complaint eventually was amended to leave the public-nuisance action as the sole claim, and abatement as the sole remedy.

Defendants moved to bar the public entities from compensating their privately retained counsel by means of contingent fees. The superior court, relying upon this court's decision in *People ex rel. Clancy v. Superior Court* (1985) 39 Cal.3d 740, 218 Cal.Rptr. 24, 705 P.2d 347 (*Clancy*), ordered the public entities barred from compensating their private counsel by means of any contingent-fee agreement, reasoning that under *Clancy*, all attorneys prosecuting public-nuisance actions must be "absolutely neutral." The superior court concluded that *Clancy* therefore precluded any arrangement in which private counsel has a financial stake in the outcome of a case brought on behalf of the public. On petition of the public entities seeking a writ of mandate, the Court of Appeal held that *Clancy* does not bar *all* contingent-fee agreements with private counsel in public-nuisance abatement actions, but only those in which private attorneys appear *in place of*, rather than *with and under the supervision of*, government attorneys.

We must decide whether the Court of Appeal correctly construed our opinion in *Clancy*, or if that case instead broadly prohibits all contingent-fee agreements between public entities and private counsel in any public-nuisance action prosecuted on behalf of the public. *Clancy* arguably supports defendants' position favoring a bright-line rule barring any attorney with a financial interest in the outcome of a case from representing the interests of the public in a public-nuisance abatement action. As set forth below, however, a reexamination of our opinion in *Clancy* suggests that our decision in that case should be narrowed, in recognition of both (1) the wide array of public-nuisance actions (and the corresponding diversity in the types of interests implicated by various prosecutions), and (2) the different means by which

prosecutorial duties may be delegated to private attorneys without compromising either the integrity of the prosecution or the public's faith in the judicial process.

I

The procedural history of this case is not in dispute. The public entities' claims against defendants originally included causes of action for fraud, strict liability, negligence, unfair business practices, and public nuisance.[1] (*County of Santa Clara v. Atlantic Richfield Co.* (2006) 137 Cal.App.4th 292, 300, 40 Cal.Rptr.3d 313 (*Santa Clara*).) The superior court granted defendants' motion for summary judgment on all causes of action. The Court of Appeal reversed the superior court's judgment of dismissal and ordered the lower court to reinstate the public-nuisance, negligence, strict liability, and fraud causes of action. (*Id.* at p. 333, 40 Cal.Rptr.3d 313.) Thereafter, the public entities filed a fourth amended complaint that alleged a single cause of action, for public nuisance, and sought only abatement. Throughout this litigation,

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[1] The plaintiffs in this case are County of Santa Clara (Santa Clara), County of San Mateo (San Mateo), County of Monterey (Monterey), County of Solano (Solano), County of Los Angeles, County of Alameda (Alameda), City and County of San Francisco (San Francisco), City of Oakland (Oakland), City of Los Angeles, and City of San Diego (San Diego).

As a result of corporate acquisition and merger, the names of the defendants in the action below are Atlantic Richfield Company, Millennium Inorganic Chemicals, Inc., Millennium Holdings LLC, American Cyanamid Company, ConAgra Grocery Products Company, E.I. du Pont de Nemours and Company, NL Industries, Inc., Sherwin-Williams Company, The O'Brien Corporation, and Does Nos. 1-50, inclusive.

the public entities have been represented both by their government counsel and by private counsel.

Upon remand following *Santa Clara*, *supra*, 137 Cal.App.4th 292, 40 Cal.Rptr.3d 313, defendants filed a "motion to bar payment of contingent fees to private attorneys," asserting that "the government cannot retain a private attorney on a contingent fee basis to litigate a public nuisance claim." Defendants sought "an order that precludes plaintiffs from retaining outside counsel under any agreement in which payment of fees and costs is contingent on the outcome of the litigation."

Defendants attached to their motion a number of fee agreements between the public entities and their private counsel, and the public entities filed opposition to which they attached their fee agreements and declarations of their government attorneys and private counsel. The fee agreements and declarations disclose that the public entities and private counsel agreed that, other than $150,000 that would be forwarded by Santa Clara to cover initial costs, private counsel would incur all further costs and would not receive any legal fees unless the action were successful. If the action succeeded, private counsel would be entitled to recover any unreimbursed costs from the "recovery" and a fee of 17 percent of the "net recovery."

Some of the contingent-fee agreements in the present case specify the respective authority of both private counsel and public counsel to control the conduct of the pending litigation. The fee agreements between private counsel and San Francisco, Santa Clara, Alameda, Monterey, and San Diego explicitly provide that the public entities' government counsel "retain final authority over all aspects of the

Litigation."[2] Private counsel for those five public entities submitted declarations confirming that their clients' government counsel retain "complete control" over the litigation.[3] The two remaining fee agreements contained in the record—those involving Solano and Oakland—purport to grant private counsel "absolute discretion in the decision of who to sue and who not to sue, if anyone, and what theories to plead and what evidence to present." During proceedings in the trial court, Oakland disclaimed this fee agreement and asserted that its government counsel had retained "complete control" of the litigation and intended to revise the agreement to reflect this circumstance.[4]

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[2] Four of these five public entities submitted declarations of government counsel stating that they had "retained and continue[d] to retain complete control of the litigation," were "actively involved in and direct[ed] all decisions related to the litigation," and have "direct oversight over the work of outside counsel." San Francisco's submission declared that "[t]he San Francisco City Attorney's Office has in fact retained control over all significant decisions" in this case.

[3] Private counsel Cotchett, Pitre & McCarthy submitted a declaration in which it stated it had been retained by Santa Clara, Solano, Alameda, Oakland, Monterey, San Mateo, and San Diego. This law firm asserted that these public entities' government counsel "have maintained and continue to maintain complete control over all aspects of the litigation" and "all decision making authority and responsibility." Private counsel Thornton & Naumes, private counsel Motley, Rice, and private counsel Mary E. Alexander submitted declarations asserting that they had been retained by San Francisco to assist in this litigation, and that San Francisco's city attorney "has retained complete control over this litigation" and has "exercised full decision-making authority and responsibility."

[4] Oakland submitted a declaration by one of its deputy city attorneys stating that "Notwithstanding any documents suggesting the contrary, the Office of the City Attorney has retained complete control over the prosecution of the public

Solano's private counsel asserts that its public counsel have "maintained and continue[s] to maintain complete control over all aspects of the litigation" and "all decision making authority and responsibility." The record before us does not contain the fee agreements between the three other public-entity petitioners and their respective private counsel.[5]

The various fee agreements provide different definitions of "recovery." Some of the agreements define the term "recovery" as "moneys other than civil penalties," whereas others define this term as the "amount recovered, by way of judgment, settlement, or other resolution." Some of the agreements include the phrase "both monetary and non-monetary" in their definitions of "recovery." The San Diego agreement defines "net recovery" as "the payment of money, stock, and/or . . . the value of the abatement remedy after the deduction of the costs paid or to be paid." The Santa Clara fee agreement provides that, "[i]n the event that the Litigation is resolved by settlement under terms involving the provision of goods, services or any other 'in-kind' payment, the

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nuisance cause of action in this case as it relates to the interests of the People of the City of Oakland." Oakland asserted it was "in the process of revising" its fee agreement "so that it reflects the reality of the relationship" between Oakland and its private counsel.

[5] Seven separate fee agreements between the various public entities and their private counsel were before the lower courts and are part of the record before this court. These fee agreements are between private counsel and Santa Clara, Monterey, San Francisco, Solano, Oakland, Alameda, and San Diego. The record does not contain the fee agreements between private counsel and San Mateo, County of Los Angeles, and City of Los Angeles, respectively, although these three entities are and remain plaintiffs in the underlying case and petitioners here.

Santa Clara County Counsel agrees to seek, as part of any such settlement, a mutually agreeable monetary settlement of attorneys' fees and expenses."

In April 2007, the superior court heard defendants' motion "to bar payment" as well as the public entities' motion for leave to file a fourth amended complaint. The court granted the public entities' motion and ordered that the pleading be filed within 30 days.

Although some preliminary issues were raised concerning the ripeness of defendants' motion, the superior court resolved the motion on its merits. The court rejected the public entities' claim that *Clancy*, *supra*, 39 Cal.3d 740, 218 Cal.Rptr. 24, 705 P.2d 347, was distinguishable, concluding instead that under *Clancy*, "outside counsel must be precluded from operating under a contingent fee agreement, regardless of the government attorneys' and outside attorneys' well-meaning intentions to have all decisions in this litigation made by the government attorneys." The court granted defendants' motion and entered an order "preclud[ing] Plaintiffs from retaining outside counsel under any agreement in which the payment of fees and costs is contingent on the outcome of the litigation . . . ." But the court allowed the public entities "30 days to file with the court new fee agreements" or "declarations detailing the fee arrangements with outside counsel."

The public entities sought a writ of mandate in the Court of Appeal. After issuing an order to show cause, the appellate court ultimately set aside the superior court's ruling and issued a writ commanding the lower court to (1) set aside its order granting defendants' motion, and (2) enter a new order denying defendants' motion. Although acknowledging that *Clancy* purported to bar the participation of private

counsel on a contingent-fee basis in public-nuisance abatement lawsuits brought in the name of a public entity, the Court of Appeal held that the rule set forth in *Clancy* is not categorical and does not bar the fee agreements made in the present case, because those agreements specified that the government attorneys would maintain full control over the litigation. The appellate court, briefly noting that the suit being prosecuted did not seek to impose criminal liability or infringe upon fundamental constitutional rights, reasoned that the circumstance that the private attorneys are being supervised by public lawyers vitiates any concern regarding the neutrality of outside counsel. We granted defendants' petition for review.

II

A

We begin our inquiry with this court's decision in *Clancy*. In that case, the City of Corona (Corona) hired James Clancy, a private attorney, to bring nuisance abatement actions against a business (the Book Store), which sold adult materials. (*Clancy, supra*, 39 Cal.3d at p. 743, 218 Cal.Rptr. 24, 705 P.2d 347.) The hiring of Clancy followed several attempts by Corona to terminate the operations of this establishment. Specifically, several months after the Book Store opened, Corona adopted two ordinances that purported to regulate adult bookstores, one defining "sex oriented material" and the other restricting the sale of such material to certain zones in Corona. (*Ibid.*) After the owner of the Book Store, Helen Ebel, filed an action in federal court, the United States Court of Appeals for the Ninth Circuit ultimately held both ordinances to be unconstitutional. (*Ebel v. City of Corona* (9th Cir. 1985) 767 F.2d 635.)

Corona subsequently retained the services of Clancy to abate nuisances under the authority of a new ordinance, proposed on the same day Clancy was hired and seemingly targeted specifically at the Book Store. (*Clancy*, *supra*, 39 Cal.3d at p. 743, 218 Cal.Rptr. 24, 705 P.2d 347.) The ordinance defined a public nuisance as "'[a]ny and every place of business in the City . . . in which obscene publications constitute all of the stock in trade, or a principal part thereof . . . .'" (*Ibid.*) The employment contract between Corona and Clancy, who was an independent contractor rather than an employee (*id.* at p. 747, 218 Cal.Rptr. 24, 705 P.2d 347), provided that he was to be paid $60 per hour for his work in bringing public-nuisance actions, except that he would be paid only $30 per hour for his work in any public-nuisance action in which Corona did not prevail or in which Corona prevailed but did not recover attorney fees. (*Id.* at p. 745, 218 Cal.Rptr. 24, 705 P.2d 347.)

Two weeks after the public-nuisance ordinance was enacted, Corona passed a resolution declaring the Book Store to be a public nuisance and revoking its business license. Thereafter, Corona and Clancy (as the city's "'special attorney'") filed a complaint against Ebel, her son Thomas Ebel, another individual, and the Book Store, seeking abatement of a public nuisance, declaratory judgment, and an injunction. (*Clancy, supra*, 39 Cal.3d at p. 744, 218 Cal.Rptr. 24, 705 P.2d 347.)[6] The Ebels unsuccessfully attempted to disqualify

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[6] During proceedings instituted to quash a subpoena issued after the filing of the lawsuit, the court allowed Corona to amend its complaint to substitute the term "City Attorney of Corona" as Clancy's title. (*Clancy*, *supra*, 39 Cal.3d at p. 744, 218 Cal.Rptr. 24, 705 P.2d 347.) Clancy appeared in the action in place of, and with no supervision by, Corona's city attorney.

Clancy as the attorney for Corona. (*Clancy*, at p. 744, 218 Cal.Rptr. 24, 705 P.2d 347.) The Ebels then sought writ relief, contending it was "improper for an attorney representing the government to have a financial stake in the outcome of an action to abate a public nuisance," and asserting that "a government attorney prosecuting such actions must be neutral, as must an attorney prosecuting a criminal case." (*Id.* at p. 745, 218 Cal.Rptr. 24, 705 P.2d 347.) This court generally agreed, finding the arrangement between Corona and Clancy "inappropriate under the circumstances." (*Id.* at p. 743, 218 Cal.Rptr. 24, 705 P.2d 347.)

We observe as a threshold matter that our decision to disqualify Clancy from representing Corona in the public-nuisance action was founded not upon any specific statutory provision or rule governing the conduct of attorneys, but rather upon the courts' general authority "to disqualify counsel when necessary in the furtherance of justice." (*Clancy*, *supra*, 39 Cal.3d at p. 745, 218 Cal.Rptr. 24, 705 P.2d 347.) Invoking that authority, this court stated that it "may order that Clancy be dismissed from the case if we find the contingent fee arrangement prejudices the Ebels." (*Ibid.*)

We concluded that for purposes of evaluating the propriety of a contingent-fee agreement between a public entity and a private attorney, the neutrality rules applicable to criminal prosecutors were equally applicable to government attorneys prosecuting certain civil cases. (*Clancy*, *supra*, 39 Cal.3d at pp. 746-747, 218 Cal.Rptr. 24, 705 P.2d 347.) Accordingly, our decision set forth the responsibilities associated with the prosecution of a criminal case, noting that a prosecutor does not represent merely an ordinary party to a controversy, but instead is the representative of a

"'"sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."'" (*Clancy*, *supra*, 39 Cal.3d at p. 746, 218 Cal.Rptr. 24, 705 P.2d 347; see *People v. Superior Court* (1977) 19 Cal.3d 255, 266, 137 Cal.Rptr. 476, 561 P.2d 1164 (*Greer*).) We noted that a prosecutor's duty of neutrality stems from two fundamental aspects of his or her employment. As a representative of the government, a prosecutor must act with the impartiality required of those who govern. Moreover, because a prosecutor has as a resource the vast power of the government, he or she must refrain from abusing that power by failing to act evenhandedly. (*Clancy*, *supra*, 39 Cal.3d at p. 746, 218 Cal.Rptr. 24, 705 P.2d 347.) With these principles in mind, we declared that not only is a government lawyer's neutrality "essential to a fair outcome for the litigants in the case in which he is involved, it is essential to the proper function of the judicial process as a whole." (*Ibid.*)

Recognizing that a city attorney is a public official, we noted that "the rigorous ethical duties imposed on a criminal prosecutor also apply to government lawyers generally." (*Clancy*, *supra*, 39 Cal.3d at p. 748, 218 Cal.Rptr. 24, 705 P.2d 347.) Thus, pursuant to the American Bar Association's then Model Code of Professional Responsibility, a lawyer who is a public officer "'should not engage in activities in which his personal or professional interests are or foreseeably may be in conflict with his official duties.'" (*Clancy*, *supra*, 39 Cal.3d at p. 747, 218 Cal.Rptr. 24, 705 P.2d 347, quoting former ABA Model Code Prof. Responsibility, EC 8-8.) "'[An] attorney holding public office should avoid all conduct which might lead the layman

to conclude that the attorney is utilizing his public position to further his professional success or personal interests.'" (*Clancy*, *supra*, 39 Cal.3d at p. 747, 218 Cal.Rptr. 24, 705 P.2d 347, quoting ABA Com. on Prof. Ethics, opn. No. 192 (1939).) Notably, we held that because public lawyers handling noncriminal matters are subject to the same ethical conflict-of-interest rules applicable to public prosecutors, "there is a class of civil actions that demands the representative of the government to be absolutely neutral. This requirement precludes the use in such cases of a contingent fee arrangement." (*Clancy*, *supra*, 39 Cal.3d at p. 748, 218 Cal.Rptr. 24, 705 P.2d 347.)

We further held that public-nuisance abatement actions belong to the class of civil cases in which counsel representing the government must be absolutely neutral. (*Clancy*, *supra*, 39 Cal.3d at p. 749, 218 Cal.Rptr. 24, 705 P.2d 347.) We came to this conclusion by analogizing a public-nuisance abatement action to an eminent domain action—a type of proceeding in which we already had concluded that government attorneys must be unaffected by personal interest. (*Id.* at p. 748, 218 Cal.Rptr. 24, 705 P.2d 347, citing *City of Los Angeles v. Decker* (1977) 18 Cal.3d 860, 871, 135 Cal.Rptr. 647, 558 P.2d 545.)

We explained: "[T]he abatement of a public nuisance involves a balancing of interests. On the one hand is the interest of the people in ridding their city of an obnoxious or dangerous condition; on the other hand is the interest of the landowner in using his property as he wishes. And when an establishment such as an adult bookstore is the subject of the abatement action, something more is added to the balance: not only does the landowner have a First Amendment interest in selling protected material, but the public

has a First Amendment interest in having such material available for purchase. Thus, as with an eminent domain action, the abatement of a public nuisance involves a delicate weighing of values. Any financial arrangement that would tempt the government attorney to tip the scale cannot be tolerated." (*Clancy*, *supra*, 39 Cal.3d at p. 749, 218 Cal.Rptr. 24, 705 P.2d 347.) Moreover, "[a] suit to abate a public nuisance can trigger a criminal prosecution of the owner of the property. This connection between the civil and criminal aspects of public nuisance law further supports the need for a neutral prosecuting attorney." (*Ibid.*)

We concluded that James Clancy—although he was an independent contractor and not an employee of the City of Corona—nonetheless was subject to the same neutrality guidelines applicable to Corona's public lawyers, because "a lawyer cannot escape the heightened ethical requirements of one who performs governmental functions merely by declaring he is not a public official. The responsibility follows the job: if Clancy is performing tasks on behalf of and in the name of the government to which greater standards of neutrality apply, he must adhere to those standards." (*Clancy*, *supra*, 39 Cal.3d at p. 747, 218 Cal. Rptr. 24, 705 P.2d 347.)

Finally, we held that because Clancy's hourly rate would double in the event Corona were successful in the litigation against the Ebels and the Book Store, it was evident that Clancy had an interest extraneous to his official function in the actions he was prosecuting on behalf of Corona. Accordingly, "the contingent fee arrangement between the City and Clancy is antithetical to the standard of neutrality that an attorney representing the government must meet

when prosecuting a public nuisance abatement action. In the interests of justice, therefore, we must order Clancy disqualified from representing the City in the pending abatement action." (*Clancy*, *supra*, 39 Cal.3d at p. 750, 218 Cal.Rptr. 24, 705 P.2d 347.) We expressly noted that Corona was not precluded from rehiring Clancy to represent it on other terms. (*Id.* at p. 750, fn. 5, 218 Cal.Rptr. 24, 705 P.2d 347.)

Importantly, we also noted that "[n]othing we say herein should be construed as preventing the government, under appropriate circumstances, from engaging private counsel. Certainly there are cases in which a government may hire an attorney on a contingent fee to try a civil case." (*Clancy*, *supra*, 39 Cal.3d at p. 748, 218 Cal.Rptr. 24, 705 P.2d 347.) As an example of such a permissible instance of representation, we cited *Denio v. City of Huntington Beach* (1943) 22 Cal.2d 580, 140 P.2d 392, a case in which we had approved a contingent-fee arrangement between the City of Huntington Beach and a law firm hired to represent it in all matters relating to protection of the city's oil rights. Thus, we recognized that contingent-fee arrangements in ordinary civil cases generally are permitted. (*Clancy*, *supra*, 39 Cal.3d at p. 748, 218 Cal.Rptr. 24, 705 P.2d 347.)

B

As is evident from the preceding discussion, our decision in *Clancy*, *supra*, 39 Cal.3d 740, 218 Cal. Rptr. 24, 705 P.2d 347, was guided, in large part, by the circumstance that the public-nuisance action pursued by Corona implicated interests akin to those inherent in a criminal prosecution. In light of this similarity, we found it appropriate to invoke directly the disqualification rules applicable to criminal prosecutors-rules that categorically bar contingent-fee

agreements in all instances. As we observed in *Clancy*, contingent-fee "contracts for criminal prosecutors have been recognized to be unethical and potentially unconstitutional, but there is virtually no law on the subject." (*Clancy*, *supra*, 39 Cal.3d at p. 748, 218 Cal.Rptr. 24, 705 P.2d 347.) Nonetheless, we noted it is generally accepted that any type of arrangement conditioning a public prosecutor's remuneration upon the outcome of a case is widely condemned. (*Ibid.*, citing ABA Stds. for Criminal Justice, Prosecution Function, com. to former Std. 2.3(e) ["'it is clear that [case-by-case] fee systems of remuneration for prosecuting attorneys raise serious ethical and perhaps constitutional problems, are totally unacceptable under modern conditions, and should be abolished promptly'"].)

Accordingly, although there are virtually no cases considering the propriety of compensation of public prosecutors pursuant to a contingent-fee arrangement, it would appear that under most, if not all, circumstances, such a method of compensation would be categorically barred. This is so because giving a public prosecutor a direct pecuniary interest in the outcome of a case that he or she is prosecuting "would render it unlikely that the defendant would receive a fair trial." (Pen.Code, § 1424, subd. (a)(1); see *Greer*, *supra*, 19 Cal.3d at p. 266, 137 Cal.Rptr. 476, 561 P.2d 1164 [explaining that disqualification was required in order to protect the defendant's fundamental due process right not to be deprived of liberty without a fair trial, and to enforce the prosecutor's obligation "to respect this mandate"].)[7]

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[7] It also seems beyond dispute that due process would not allow for a criminal prosecutor to employ private cocounsel pursuant to a contingent-fee arrangement that conditioned the

Our opinion in *Clancy* recognized that the interests invoked in that case were akin to the vital interests implicated in a criminal prosecution, and thus invocation of the disqualification rules applicable to criminal prosecutors was justified. And if those rules are found to be equally applicable in the case now before us, disqualification of the private attorneys hired to assist the public entities similarly would be required.

As explained below, however, to the extent our decision in *Clancy* suggested that public-nuisance prosecutions always invoke the same constitutional and institutional interests present in a criminal case, our analysis was unnecessarily broad and failed to take into account the wide spectrum of cases that fall within the public-nuisance rubric. In the present case, both the types of remedies sought and the types of interests implicated differ significantly from those involved in *Clancy* and, accordingly, invocation of the strict rules requiring the automatic disqualification of criminal prosecutors is unwarranted.

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private attorney's compensation on the outcome of the criminal prosecution. (See *State of Rhode Island v. Lead Industries Assn., Inc.* (R.I. 2008) 951 A.2d 428, 475, fn. 48 (*State of Rhode Island*) [explicitly refraining from allowing contingent-fee arrangement in the criminal context, because the court was "unable to envision a criminal case where contingent fees would ever be appropriate—even if they were not explicitly barred, as is the case in this jurisdiction"]; cf. *People v. Eubanks* (1996) 14 Cal.4th 580, 596, 598, 59 Cal.Rptr.2d 200, 927 P.2d 310 [finding cognizable conflict of interest because of the circumstance that the corporate crime victim paid the "'substantial'" debts and expenses incurred by the district attorney investigating the case, and that such payment evidenced a " 'reasonable possibility' the prosecutor might not exercise his discretionary functions in an evenhanded manner"].)

The broad spectrum of public-nuisance law may implicate both civil and criminal liability.[8] Indeed, public-nuisance actions vary widely, as evidenced by Penal Code section 370, which broadly defines a public nuisance as "[a]nything which is injurious to health, or is indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property by an entire community or neighborhood, or by any considerable number of persons, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street or highway. . . ."[9]

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[8] As explained by the authors of a recent law review article, public nuisance law over the course of its development has become increasingly more civil in nature than criminal. The precepts of public-nuisance law migrated to colonial America from the English common law virtually unchanged, and at that time were primarily criminal. (Faulk and Gray, *Alchemy in the Courtroom? The Transmutation of Public Nuisance Litigation* (2007) 2007 Mich. St. L.Rev. 941, 951 (Faulk and Gray).) Eventually, however, violation of public-nuisance law came to be considered as a tort, and its criminal enforcement was invoked much less frequently. As state legislators began to enact statutes prohibiting particular conduct and setting specific criminal penalties for such conduct, there was little need for the broad and somewhat vague crime of nuisance. (*Ibid.*; Rest.2d Torts, § 821B, com. c, p. 88.)

[9] From its earliest incarnation in the common law, public-nuisance law proscribed an "interference with the interests of the community at large—interests that were recognized as rights of the general public entitled to protection." (Rest.2d Torts § 821B, com. b, p. 88; see also Faulk and Gray, *supra*, 2007 Mich. St. L.Rev. at p. 951; Gifford, *Public Nuisance as a Mass Products Liability Tort* (2003) 71 U. Cin. L.Rev. 741, 790-791, 794.)

Although in *Clancy* we spoke generally of a "balancing of interests" and a "delicate weighing of values" (*Clancy*, *supra*, 39 Cal.3d at p. 749, 218 Cal.Rptr. 24, 705 P.2d 347), our concerns regarding neutrality, fairness, and a possible abuse of the judicial process by an interested party appear to have been highly influenced by the circumstances of the case then before us—a long-running attempt by the City of Corona to shut down a single adult bookstore. As set forth above, when Corona's first attempts at legislating the bookstore out of business were ruled unconstitutional, it hired a private attorney with a personal and pecuniary interest in the case to file a nuisance action against the bookstore pursuant to a newly enacted ordinance that clearly was intended to specifically target that business.

The history of Corona's efforts to shut down the bookstore revealed a profound imbalance between the institutional power and resources of the government and the limited means and influence of the defendants-whose vital property rights were threatened. Under California law, the continued operation of an established, lawful business is subject to heightened protections. (*See Goat Hill Tavern v. City of Costa Mesa* (1992) 6 Cal.App.4th 1519, 1529, 8 Cal.Rptr.2d 385 [continued operation of 35-year business that was making recent substantial improvements was recognized as a vested right]; *Livingston Rock & Gravel Co. v. County of L.A.* (1954) 43 Cal.2d 121, 127, 272 P.2d 4 [noting that businesses generally cannot be immediately terminated due to nonconformance with rezoning ordinances, because of the "hardship and doubtful constitutionality" of such discontinuance].) It was in this factual setting that we noted that the abatement of a public nuisance involves a "balancing of interests. On the one hand is the

interest of the people in ridding their city of an obnoxious or dangerous condition; on the other hand is the interest of the landowner in using his property as he wishes." (*Clancy*, *supra*, 39 Cal.3d at p. 749, 218 Cal.Rptr. 24, 705 P.2d 347.)

The case also implicated both the defendants' and the public's constitutional free-speech rights. As we recognized in *Clancy*, the operation of the adult bookstore involved speech that arguably was protected in part, and thus curtailment of the right to disseminate the books in question could significantly infringe upon the Ebels' liberty interest in free speech. Again, our focus upon the critical "balancing of interests" was guided by the circumstance that Corona was attempting to abate a public nuisance created by an adult bookstore—thus adding something more "to the balance: not only does the landowner have a First Amendment interest in selling protected material, but the public has a First Amendment interest in having such material available for purchase." (*Clancy*, *supra*, 39 Cal.3d at p. 749, 218 Cal. Rptr. 24, 705 P.2d 347.)[10]

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[10] Moreover, we also found it significant that "[a] suit to abate a public nuisance can trigger a criminal prosecution of the owner of the property. This connection between the civil and criminal aspects of public nuisance law further supports the need for a neutral prosecuting attorney." (*Clancy*, *supra*, 39 Cal.3d at p. 749, 218 Cal.Rptr. 24, 705 P.2d 347.)

As we explained, public-nuisance "actions are brought in the name of the People by the district attorney or city attorney. (Code Civ. Proc., § 731.) A person who maintains or commits a public nuisance is guilty of a misdemeanor. (Pen.Code, § 372.) 'A public or common nuisance . . . is a species of catch-all criminal offense, consisting of an interference with the rights of the community at large . . . . As in the case of other crimes, the normal remedy is in the hands of the state.'" (*Clancy*, *supra*, 39

It is evident that the nature of the particular nuisance action involved in *Clancy* was an important factor in leading us to conclude the rules governing the disqualification of criminal prosecutors properly should be invoked to disqualify James Clancy.[11] The direct application of those rules was warranted because the public-nuisance abatement action at issue implicated important constitutional concerns, threatened ongoing business activity, and carried the threat of criminal liability. In light of these interests, the case required the same "balancing of interests" and "delicate weighing of values" on the part of the

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Cal.3d at p. 749, 218 Cal.Rptr. 24, 705 P.2d 347, fn. omitted, quoting Prosser and Keeton, The Law of Torts (5th ed. 1984) p. 618.)

[11] The disqualification of public prosecutors is governed by Penal Code section 1424, which provides that a motion to recuse a prosecutor "may not be granted unless the evidence shows that a conflict of interest exists that would render it unlikely that the defendant would receive a fair trial." (Pen.Code, § 1424, subd. (a)(1); see *Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 711, 76 Cal.Rptr.3d 250, 182 P.3d 579 (*Haraguchi*) [noting that Pen.Code, § 1424 " 'articulates a two-part test: "(i) is there a conflict of interest?; and (ii) is the conflict so severe as to disqualify the district attorney from acting?" "].)

Although Penal Code section 1424 does not, by its terms, govern the conduct of civil government attorneys, we held in *Clancy* that certain government attorneys—because of the nature of the action they are prosecuting—must, like a criminal prosecutor, be free of any conflict of interest that might compromise a fair trial for the defendant. Although we did not invoke section 1424 in *Clancy* and instead analyzed the case under principles of neutrality—by considering whether an attorney's extraneous interest in a case would prejudice a defendant-the rule we applied unquestionably was derived from, and was substantially similar to, the conflict-of-interest rule applicable to criminal prosecutors. (See *Haraguchi*, *supra*, 43 Cal.4th at p. 711, 76 Cal.Rptr.3d 250, 182 P.3d 579.)

government's attorney prosecuting the case as would be required in a criminal prosecution. Because of this strong correlation, the disqualification of a private attorney with a pecuniary interest in the outcome of the case was mandated.

The public-nuisance action in the present case, by contrast, involves a qualitatively different set of interests—interests that are not substantially similar to the fundamental rights at stake in a criminal prosecution. We find this distinguishing circumstance to be dispositive. As set forth above, neutrality is a critical concern in criminal prosecutions because of the important constitutional liberty interests at stake. On the other hand, in ordinary civil cases, we do not require neutrality when the government acts as an ordinary party to a controversy, simply enforcing its own contract and property rights against individuals and entities that allegedly have infringed upon those interests. Indeed, as discussed above, we specifically observed in *Clancy* that the government was not precluded from engaging private counsel on a contingent-fee basis in an ordinary civil case. Thus, for example, public entities may employ private counsel on such a basis to litigate a tort action involving damage to government property, or to prosecute other actions in which the governmental entity's interests in the litigation are those of an ordinary party, rather than those of the public. (*Clancy*, *supra*, 39 Cal.3d at p. 748, 218 Cal.Rptr. 24, 705 P.2d 347.)

The present case falls between these two extremes on the spectrum of neutrality required of a government attorney. The present matter is not an "ordinary" civil case in that the public entities' attorneys are appearing as representatives of the public and not as counsel for the government acting

as an ordinary party in a civil controversy. A public-nuisance abatement action must be prosecuted by a governmental entity and may not be initiated by a private party unless the nuisance is personally injurious to that private party. (Civ.Code, § 3493 ["A private person may maintain an action for a public nuisance, if it is specially injurious to himself, but not otherwise"]; *id.*, § 3494 ["[a] public nuisance may be abated by any public body or officer authorized thereto by law"].) There can be no question, therefore, that the present case is being prosecuted on behalf of the public, and that accordingly the concerns we identified in *Clancy* as being inherent in a public prosecution are, indeed, implicated in the case now before us.

Yet, neither are the interests affected in this case similar in character to those invoked by a criminal prosecution or the nuisance action in *Clancy*. Although the remedy for the successful prosecution of the present case is unclear, we can confidently deduce what the remedy will *not be*. This case will not result in an injunction that prevents the defendants from continuing their current business operations. The challenged conduct (the production and distribution of lead paint) has been illegal since 1978. Accordingly, whatever the outcome of the litigation, no ongoing business activity will be enjoined. Nor will the case prevent defendants from exercising any First Amendment right or any other liberty interest. Although liability may be based in part on prior commercial speech, the *remedy* will not involve enjoining current or future speech. Finally, because the challenged conduct has long since ceased, the statute of limitations on any criminal prosecution has run and there is neither a threat nor a possibility of criminal liability being imposed upon defendants.

The adjudication of this action will involve at least some balancing of interests, such as the social utility of defendants' product against the harm it has caused, and may implicate the free-speech rights exercised by defendants when they marketed their products and petitioned the government to oppose regulations. Nevertheless, that balancing process and those constitutional rights involve only past acts—not ongoing marketing, petitioning, or property/business interests. Instead, the trial court will be asked to determine whether defendants should be held liable for creating a nuisance and, if so, how the nuisance should be abated. This case will result, at most, in defendants' having to expend resources to abate the lead-paint nuisance they allegedly created, either by paying into a fund dedicated to that abatement purpose or by undertaking the abatement themselves. The expenditure of resources to abate a hazardous substance affecting the environment is the type of remedy one might find in an ordinary civil case and does not threaten the continued operation of an existing business.

Of course, because this is a public-nuisance action, and the public entities are not merely pursuing abatement on government property but on private property located within their jurisdictions, defendants' potential exposure may be very substantial. The possibility of such a substantial judgment, however, does not affect the type of fundamental rights implicated in criminal prosecutions or in *Clancy*, *supra*, 39 Cal.3d 740, 218 Cal.Rptr. 24, 705 P.2d 347. There is no indication that the contingent-fee arrangements in the present case have created a danger of governmental overreaching or economic coercion. Defendants are large corporations with access to abundant monetary and legal resources. Accordingly, the concern we

expressed in *Clancy* about the misuse of governmental resources against an outmatched individual defendant is not implicated in the present case.

Thus, because—in contrast to the situation in *Clancy*—neither a liberty interest nor the right of an existing business to continued operation is threatened by the present prosecution, this case is closer on the spectrum to an ordinary civil case than it is to a criminal prosecution. The role played in the current setting both by the government attorneys and by the private attorneys differs significantly from that played by the private attorney in *Clancy*. Accordingly, the absolute prohibition on contingent-fee arrangements imported in *Clancy* from the context of criminal proceedings is unwarranted in the circumstances of the present civil public-nuisance action.[12]

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[12] Nor is the applicable standard that which governs the disqualification of judges and other adjudicators. It is well established that the disqualification rules applicable to adjudicators are more stringent than those that govern the conduct of prosecutors and other government attorneys. (*People v. Freeman* (2010) 47 Cal.4th 993, 996, 103 Cal.Rptr.3d 723, 222 P.3d 177 [holding that for purposes of judicial disqualification, the constitutional standard is whether ""the probability of actual bias on the part of the judge or decisionmaker . . . is too high to be constitutionally tolerable"" (citing *Caperton v. A.T. Massey Coal Co., Inc.* (2009)—U.S.—[129 S.Ct. 2252, 173 L.Ed.2d 1208]; Code Civ. Proc. § 170.1 [setting forth statutory grounds for disqualification of judges]; *Marshall v. Jerrico, Inc.* (1980) 446 U.S. 238, 243 [100 S.Ct. 1610, 64 L.Ed.2d 182] [noting that "the strict requirements of *Tumey* [*v. Ohio* (1927)] 273 U.S. 510 [47 S.Ct. 437, 71 L.Ed. 749] and *Ward* [*v. Village of Monroeville* (1972) 409 U.S. 57, 93 S.Ct. 80, 34 L.Ed.2d 267] are not applicable to the determinations of the assistant regional administrator, whose functions resemble those of a prosecutor more closely than those of a judge"].)

C

Nevertheless, as set forth above, because the public-nuisance abatement action is being prosecuted on behalf of the public, the attorneys prosecuting this action, although not subject to the same stringent conflict-of-interest rules governing the conduct of criminal prosecutors or adjudicators, are subject to a heightened standard of ethical conduct applicable to public officials acting in the name of the public-standards that would not be invoked in an ordinary civil case.

The underlying principle that guided our decision in *Clancy* was that a civil attorney acting on behalf of a public entity, in prosecuting a civil case such as a public-nuisance abatement action, is entrusted with the unique power of the government and therefore must refrain from abusing that power by failing to act in an evenhanded manner. (*Clancy*, *supra*, 39 Cal.3d at p. 749, 218 Cal.Rptr. 24, 705 P.2d 347; see also *Greer*, *supra*, 19 Cal.3d at p. 267, 137 Cal.Rptr. 476, 561 P.2d 1164 [a prosecuting attorney ""'is the representative of the public in whom is lodged a discretion which is not to be controlled by the courts, or by an interested individual'"" (italics omitted)]; *City of Los Angeles v. Decker*, *supra*, 18 Cal.3d at p. 871, 135 Cal.Rptr. 647, 558 P.2d 545 [a "'government lawyer in a civil action . . . should not use his position or the economic power of the government to harass parties or to bring about unjust settlements or results'"].) Indeed, it is a bedrock principle that a government attorney prosecuting a public action on behalf of the government must not be motivated solely by a desire to win a case, but instead owes a duty to the public to ensure that justice will be done. (*Greer*, *supra*, 19 Cal.3d at p. 267, 137 Cal.Rptr. 476, 561 P.2d 1164.)

These principles of heightened neutrality remain valid and necessary in the context of the situation presented by the case before us. A fair prosecution and outcome in a proceeding brought in the name of the public is a matter of vital concern both for defendants and for the public, whose interests are represented by the government and to whom a duty is owed to ensure that the judicial process remains fair and untainted by an improper motivation on the part of attorneys representing the government. Accordingly, to ensure that an attorney representing the government acts evenhandedly and does not abuse the unique power entrusted in him or her in that capacity—and that public confidence in the integrity of the judicial system is not thereby undermined—a heightened standard of neutrality is required for attorneys prosecuting public-nuisance cases on behalf of the government.

We must determine whether this heightened standard of neutrality is compromised by the hiring of contingent-fee counsel to assist government attorneys in the prosecution of a public-nuisance abatement action of the type involved in the present proceedings. For the reasons that follow, we conclude that this standard is not compromised. Because private counsel who are remunerated on a contingent-fee basis have a direct pecuniary interest in the outcome of the case, they have a conflict of interest that potentially places their personal interests at odds with the interests of the public and of defendants in ensuring that a public prosecution is pursued in a manner that serves the public, rather than serving a private interest. This conflict, however, does not necessarily mandate disqualification in public-nuisance cases when fundamental constitutional rights and the right to continue operation of an existing business are not

implicated. Instead, retention of private counsel on a contingent-fee basis is permissible in such cases if neutral, conflict-free government attorneys retain the power to control and supervise the litigation. As explained below, because public counsel are themselves neutral, and because these neutral attorneys retain control over critical discretionary decisions involved in the litigation, the heightened standard of neutrality is maintained and the integrity of the government's position is safeguarded. Thus, in a case where the government's action poses no threat to fundamental constitutional interests and does not threaten the continued operation of an ongoing business, concerns about neutrality are assuaged if the litigation is controlled by neutral attorneys, even if some of the attorneys involved in the case in a subsidiary role have a conflict of interest that might-if present in a public attorney-mandate disqualification.

This reasoning recently was embraced by the Supreme Court of Rhode Island, which approved the state attorney general's employment of private counsel on a contingent-fee basis to prosecute public-nuisance abatement actions against lead paint manufacturers-a case identical in all material respects to the underlying action here. (*State of Rhode Island, supra*, 951 A.2d 428.) That court considered the propriety of the contingent-fee agreements in light of the state attorney general's status as a public servant, and his attendant responsibility to seek justice rather than prevail at all costs. (*Id.* at p. 472.) The state high court noted that the attorney general was bound by the ethical standards governing the conduct of public prosecutors. (*Ibid.*) Ultimately, citing the underlying decision of the Court of Appeal in the present case, the court in *State of Rhode Island* concluded that "there is nothing unconstitutional or illegal or

inappropriate in a contractual relationship whereby the Attorney General hires outside attorneys on a contingent fee basis to assist in the litigation of certain *non-criminal* matters. Indeed, it is our view that the ability of the Attorney General to enter into such contractual relationships may well, in some circumstances, lead to results that will be beneficial to society—results which otherwise might not have been attainable. However, due to the special duty of attorneys general to 'seek justice' and their wide discretion with respect to same, such contractual relationships must be accompanied by exacting limitations . . . . [I]t is our view that the Attorney General is not precluded from engaging private counsel pursuant to a contingent fee agreement in order to assist in certain civil litigation, so long as the Office of Attorney General retains *absolute and total control over all critical decision-making* in any case in which such agreements have been entered into." (*State of Rhode Island*, at p. 475, original italics, boldface and fns. omitted.)

We generally agree with the Supreme Court of Rhode Island and the Court of Appeal in the present case that there is a critical distinction between an employment arrangement that fully delegates governmental authority to a private party possessing a personal interest in the case, and an arrangement specifying that private counsel remain subject to the supervision and control of government attorneys. Private counsel serving in a subordinate role do not supplant a public entity's government attorneys, who have no personal or pecuniary interest in a case and therefore remain free of a conflict of interest that might require disqualification. Accordingly, in a case in which private counsel are subject to the supervision and control of government attorneys, the discretionary

decisions vital to an impartial prosecution are made by neutral attorneys and the prosecution may proceed with the assistance of private counsel, even though the latter have a pecuniary interest in the case.

It is true that the public attorneys' decisionmaking conceivably could be influenced by their professional reliance upon the private attorneys' expertise and a concomitant sense of obligation to those attorneys to ensure that they receive payment for their many hours of work on the case. This circumstance may fairly be viewed as being somewhat akin to having a personal interest in the case. Nevertheless, this is not the type of personal conflict of interest that requires disqualification of the public attorneys. As this court has stated: "'"[A]lmost any fee arrangement between attorney and client may give rise to a conflict . . . The contingent fee contract so common in civil litigation creates a 'conflict' when either the attorney or the client needs a quick settlement while the other's interest would be better served by pressing on in the hope of a greater recovery. The variants of this kind of 'conflict' are infinite. Fortunately most attorneys serve their clients honorably despite the opportunity to profit by neglecting or betraying the client's interest."'" (*People v. Doolin* (2009) 45 Cal.4th 390, 416, 87 Cal.Rptr.3d 209, 198 P.3d 11.)[13]

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[13] In furtherance of their contention that the retention of private counsel on a contingent-fee basis is impermissible in public-nuisance-abatement actions because such financial arrangements create a sense of obligation toward private counsel on the part of public counsel, defendants and their amici cite to our discussion of the obligation incurred by a criminal prosecutor toward the victim who provided substantial financial assistance to the district attorney's office in *People v. Eubanks*, *supra*, 14 Cal.4th 580, 59 Cal.Rptr.2d 200, 927 P.2d 310, in which we held that the financial arrangement resulted in a

disqualifying conflict of interest on behalf of the public prosecutor. (*Id.* at p. 596, 59 Cal.Rptr.2d 200, 927 P.2d 310.) This reliance upon *Eubanks* is misplaced.

As a threshold matter, as we explained above, public-nuisance-abatement actions that do not implicate fundamental constitutional rights or threaten the operation of an existing business do not invoke the same concerns regarding neutrality as those present in a criminal prosecution, and therefore attorneys pursuing such claims are not subject to the strict disqualification rules applicable to criminal prosecutors that we invoked to disqualify the public attorneys in *Eubanks*. Moreover, even under the disqualification standard applied in *Eubanks*, the retention of private counsel on a contingent-fee basis in public-nuisance actions is distinguishable from the financial arrangement we found impermissible in that case. In *Eubanks*, *supra*, we reasoned that because criminal defendants have "no right to expect that crimes should go unpunished for lack of public funds," the mere fact that the victim's financial assistance enables the prosecutor to proceed further or more quickly "would not, by itself, constitute unfair treatment." (14 Cal.4th at p. 599, 59 Cal.Rptr.2d 200, 927 P.2d 310.) Instead, a disabling conflict is established "in this factual context[ ] only by a showing that the private financial contributions are of a nature and magnitude likely to put the prosecutor's discretionary decisionmaking within the influence or control of an interested party." (*Ibid*; see also *Hambarian v. Superior Court* (2002) 27 Cal.4th 826, 836, 118 Cal.Rptr.2d 725, 44 P.3d 102 [recusal is not required simply because victim pays for expense the district attorney's office otherwise would have incurred].) Applying that reasoning to the retention of contingent-fee counsel by public entities pursuing public-nuisance-abatement actions, it is evident that individuals and business entities that create public nuisances similarly have no right to expect that abatement actions will not be brought "for lack of public funds." Thus, the mere circumstance that contingent-fee counsel enable public attorneys to prosecute the case does not, by itself, constitute unfair treatment.

Nor are the financial contributions of private counsel of a nature or magnitude likely to put the public attorneys' discretionary decisionmaking within the influence or control of an

As recognized by the American Bar Association, attorneys are expected to resolve conflicts between their personal interests and their ethical and professional responsibilities "through the exercise of sensitive professionalism and moral judgment." (ABA Model Rules Prof. Conduct, Preamble, par. 9.) In other words, attorneys are presumed to comport themselves with ethical integrity and to abide by all rules of profes-

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interested party. Unlike the financial assistance provided by the victim in *Eubanks*—a party with a strong personal interest in the outcome of the case and an expectation that the provision of financial assistance would incentivize the public attorneys to pursue the victim's desired outcome even if justice demanded a contrary course of action—the financial assistance in a public-nuisance case pursued with the assistance of contingent-fee counsel is provided by a group of sophisticated legal experts who have calculated the financial risk against the possible reward, and who are charged with the knowledge that public counsel's obligation to place justice above their desire to win a case may result in governmental decisions that do not maximize monetary recovery for the private attorneys.

This factual distinction is especially important in light of the specific contractual provisions we discuss *supra*. As we explain below, to ensure that the heightened standard of neutrality is maintained in the prosecution of a public-nuisance-abatement action, contingent-fee agreements between public entities and private counsel must contain specific provisions delineating the proper division of responsibility between the public and private attorneys. Specifically, those contractual provisions must provide explicitly that all critical discretionary decisions will be made by public attorneys—most notably, any decision regarding the ultimate disposition of the case. These contractual provisions reinforce the principle that the financial assistance provided by contingent-fee counsel is conditioned on the understanding that public counsel will retain full control over the litigation and, in exercising that control, must and will place their duty to serve the public interest in ensuring a fair and just proceeding above their sense of any obligation to maximize a monetary recovery for the private attorneys.

sional conduct. In light of the supervisory role played by government counsel in the litigation—and their inherent duty to serve the public's interest in any type of prosecution pursued on behalf of the public—we presume that government attorneys will honor their obligation to place the interests of their client above the personal, pecuniary interest of the subordinate private counsel they have hired.

As we have explained above, in the type of public-nuisance abatement action being prosecuted in the present case, disqualification of counsel need not be governed by the stringent disqualification rules applicable to criminal prosecutors. Nevertheless, the role of the prosecutor provides useful guidance concerning the type of discretionary decisions that must remain with neutral government attorneys to ensure that the litigation is conducted in a conflict-free manner. A public prosecutor "has broad discretion over the entire course of the criminal proceedings, from the investigation and gathering of evidence, through the decisions of whom to charge and what charges to bring, to the numerous choices at trial to accept, oppose, or challenge judicial rulings." (*Hambarian*, *supra*, 27 Cal.4th at p. 840, 118 Cal. Rptr.2d 725, 44 P.3d 102.) In *Greer*, we emphasized that it is "because the prosecutor enjoys such broad discretion that the public he serves and those he accuses may justifiably demand that he perform his functions with the highest degree of integrity and impartiality, and with the appearance thereof." (*Greer*, *supra*, 19 Cal.3d at pp. 266-267, 137 Cal.Rptr. 476, 561 P.2d 1164.) Accordingly, "the advantage of public prosecution is lost if those exercising the discretionary duties of the district attorney are subject to conflicting personal interests which might tend to compromise their impartiality." (*Id.* at p. 267, 137

Cal.Rptr. 476, 561 P.2d 1164; see also *Hambarian*, *supra*, 27 Cal.4th at p. 841, 118 Cal.Rptr.2d 725, 44 P.3d 102 [holding that proper test for a disqualifying conflict of interest under Pen.Code section § 1424 is whether "the prosecutor's *discretionary decision-making* has been placed within the influence or control of an interested party"].)

A prosecutor's authority to make critical discretionary decisions in criminal cases is vital to ensuring the neutrality we require of attorneys entrusted with that position. This is so because such discretionary decisions provide the greatest opportunity to abuse the judicial process by placing personal gain above the interests of the public in a fair and just prosecution and outcome. For the same reason, in the context of public-nuisance abatement proceedings, critical discretionary decisions similarly may not be delegated to private counsel possessing an interest in the case, but instead must be made by neutral government attorneys.

Accordingly, although the principles of heightened neutrality do not categorically bar the retention of contingent-fee counsel to assist public entities in the prosecution of public-nuisance abatement actions, those principles do mandate that all critical discretionary decisions ultimately must be made by the public entities' government attorneys rather than by private counsel—in other words, neutral government attorneys must retain and exercise the requisite control and supervision over both the conduct of private attorneys and the overall prosecution of the case. Such control of the litigation by neutral attorneys provides a safeguard against the possibility that private attorneys unilaterally will engage in inappropriate prosecutorial strategy and tactics geared to maximize

their monetary reward. Accordingly, when public entities have retained the requisite authority in appropriate civil actions to control the litigation and to make all critical discretionary decisions, the impartiality required of government attorneys prosecuting the case on behalf of the public has been maintained.

Defendants assert that even if the control of private counsel by government attorneys is viable in theory, it fails in application because private counsel in such cases are hired based upon their expertise and experience, and therefore always will assume a primary and controlling role in guiding the course of the litigation, rendering illusory the notion of government "control". To the extent defendants assert that no contractual provision delegating the division of responsibility will or can be adhered to, we decline to assume that private counsel intentionally or negligently will violate the terms of their retention agreements by acting independently and without consultation with the public-entity attorneys or that public attorneys will delegate their fundamental obligations.[14]

Defendants also contend that the concept of "control" is unworkable as a standard to govern future cases, because it will be difficult (if not impossible) for a

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[14] We also decline the suggestion of defendants and their amici curiae to view all contingent-fee agreements as inherently suspect because of an alleged "appearance of impropriety" created by such arrangements. Contingent-fee arrangements are deeply entrenched as a legitimate and sometimes prudent method of delegating risk in the context of civil litigation, and in the absence of evidence of wrongdoing or unethical conduct we decline to impugn this means of compensating counsel in the context of civil litigation.

trial court to monitor whether government counsel for a public entity is adequately fulfilling his or her supervisory role and controlling all important aspects of the litigation, including procedural tactics, the gathering and presentation of evidence, the consideration and resolution of settlement negotiations, and other discretionary matters. Defendants assert that short of egregious actions on the part of private counsel or the supervising government attorney, violations of the "control" exception would be difficult to detect.[15]

These practical concerns do not require the barring of contingent-fee arrangements in all public prosecutions. Instead, to ensure that public attorneys exercise real rather than illusory control over contingent-fee counsel. retainer agreements providing for contingent-fee retention should encompass more than boilerplate language regarding "control" or "supervision," by identifying certain critical matters regarding the litigation that contingent-fee counsel must present to government attorneys for decision. The requisite specific provisions, described below, are not comprehensive panaceas and may not all operate perfectly in the context of every contingent-fee situation, but each of them will assist parties and the court in assessing whether private counsel are abusing their prosecutorial office. Moreover, adherence to these provisions is subject to objective verification

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[15] In the present case, the evidence of the public entities' control consists of the fee arrangements as well as the declarations submitted by the public entities and their private attorneys. (See *ante*, 112 Cal.Rptr.3d at pp. 703-705, and fns. 2, 3 & 4, 235 P.3d at pp. 26-28, and fns. 2, 3 & 4.) Defendants assert in their briefing that they further attempted to obtain discovery regarding the actual control being exercised by the public entities, but that those entities refused to disclose any such additional documents, citing the attorney-client privilege.

both by defendants and by the court without the need for engaging in discovery that might intrude upon the attorney-client privilege or attorney work product protections.

In a case such as the present one, in which any remedy will be primarily monetary in nature, the authority to settle the case involves a paramount discretionary decision and is an important factor in ensuring that defendants' constitutional right to a fair trial is not compromised by overzealous actions of an attorney with a pecuniary stake in the outcome. Accordingly, retention agreements between public entities and private counsel must specifically provide that decisions regarding settlement of the case are reserved exclusively to the discretion of the public entity's own attorneys. Similarly, such agreements must specify that any defendant that is the subject of such litigation may contact the lead government attorneys directly, without having to confer with contingent-fee counsel. (Cf. ABA Formal Ethics Opn. No. 06-443 (Aug. 5, 2006) ["Model Rule of Professional Conduct 4.2 generally does not prohibit a lawyer who represents a client in a matter involving an organization from communicating with the organization's inside counsel about the subject of the representation without obtaining the prior consent of the entity's outside counsel"].)[16]

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[16] The primacy of the discretionary authority to settle a case recently was invoked by a federal court in Ohio that considered Sherwin-Williams Company's challenge, on unspecified unconstitutional grounds, to the contingent-fee agreements between three Ohio cities and private counsel in a lead paint public-nuisance abatement action very similar to the underlying action in the present case. (*Sherwin-Williams Co. v. City of Columbus* (S.D.Ohio, July 18, 2007, No. C2-06-829) 2007 WL 2079774,

Additionally, we adopt, in slightly modified form, the specific guidelines set forth by the Supreme Court of Rhode Island in *State of Rhode Island*, *supra*, 951 A.2d at page 477, footnote 52. Specifically, contingent-fee agreements between public entities and private counsel must provide: (1) that the public-entity attorneys will retain complete control over the course and conduct of the case; (2) that government attorneys retain a veto power over any decisions made by outside counsel; and (3) that a government attorney with supervisory authority must be personally involved in overseeing the litigation.

These specific provisions are not exhaustive. The unique circumstances of each prosecution may require a different set of guidelines for effective supervision

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2007 U.S. Dist. Lexis 51945.) The court originally had barred the private attorneys from providing legal representation, because "the contingency fee agreements between private counsel and the three cities were unconstitutional insofar as the agreements reposed an impermissible degree of public authority upon retained counsel, who have a financial incentive not necessarily consistent with the interests of the public body." (2007 WL 2070774 at p. *1, 2007 U.S. Dist. Lexis 51945 at pp. *3-*4.) In a subsequent ruling, the court approved the two contingent-fee agreements that had been amended to expressly vest in the city attorney "control over the litigation and the sole authority to authorize any settlement of any claim or complaint." (*Id.* at p. *2, 2007 U.S. Dist. Lexis 51945 at p. *6.) The third agreement, however, still was deficient, because it provided that neither private counsel nor the city could settle or dismiss the case without the consent of the other. (*Id.* at p. *3, 2007 U.S. Dist. Lexis 51945 at p. *10.) The court stated that it had made it "abundantly clear" in its previous ruling that a contingent-fee agreement "between a municipality and private counsel in a public nuisance action which purports to vest in private counsel authority to prevent a settlement or dismissal of a suit is unconstitutional." (*Ibid.*)

and control of the case, and public entities may find it useful to specify other discretionary decisions that will remain vested in government attorneys. Nevertheless, the aforementioned provisions comprise the minimum requirements for a retention agreement between a public entity and private counsel adequate to ensure that critical governmental authority is not improperly delegated to an attorney possessing a personal pecuniary interest in the case.

III

In the present case, five of the seven contingent-fee agreements between the public entities and private counsel contained in the record provide that the public entities' government counsel "retain final authority over all aspects of the Litigation."[17] Declarations of public counsel for these five public entities confirm that these individuals "retained and continue to retain complete control of the litigation," have been "actively involved in and direct all decisions related to the litigation," and have "direct oversight over the work of outside counsel." Private counsel submitted declarations confirming that the government counsel for the five public entities retain "complete control" over the litigation.[18] The references in these agreements

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[17] These five agreements are those of San Francisco, Santa Clara, Alameda, Monterey, and San Diego.

[18] As noted above, Oakland and Solano County have submitted declarations of their public counsel asserting that government attorneys retain full "control" over all aspects of the litigation. Nonetheless, those two entities' fee agreements in the record do not reflect this arrangement, make no provision for the retention of "final authority over all aspects" of the litigation, and do not otherwise specify that the private attorneys are subject to the supervision of public counsel. As noted above, the

to "final authority over all aspects of the litigation" fairly can be read to mandate that the government attorneys will supervise the work of the private attorneys, and will retain authority to control all critical decisionmaking in the case. The declarations establish that such general control and supervision have been exercised and are, in fact, being exercised.

Nevertheless, although five of the 10 fee agreements between the respective public entities and private counsel contain language specifying that control and supervision will be retained by the government attorneys, none of the ten fee agreements in the present case contain the other specific provisions regarding retention of control and division of responsibility that we conclude are required to safeguard against abuse of the judicial process. Accordingly, because the seven agreements that are in the record are deficient under the standard we set forth above, and because we cannot assess the sufficiency of the three remaining agreements that are not contained in the record, we reverse the judgment rendered by the Court of Appeal and remand the matter for further proceedings consistent with this opinion. Assuming the public entities contemplate pursuing this litigation assisted by private counsel on a contingent-fee basis, we conclude they may do so after revising the respective retention agreements to conform with the requirements set forth in this opinion.

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fee agreements for the County of Los Angeles, the City of Los Angeles, and San Mateo are not contained in the record before us.

WE CONCUR: KENNARD, CHIN, MORENO, JJ., and RICHMAN, J.*

Concurring opinion by WERDEGAR, J.

I concur in the judgment insofar as it vacates the superior court's order barring the plaintiff public entities from paying their private counsel under contingent fee agreements.

Although I do not agree with every aspect of the majority's reasoning, I do agree this court spoke too broadly in 1985 when it prohibited contingent fee agreements in all public nuisance cases. (See *People ex rel. Clancy v. Superior Court* (1985) 39 Cal.3d 740, 748-750, 218 Cal.Rptr. 24, 705 P.2d 347 (*Clancy*).) As the majority explains, public nuisance cases comprise a wide range of factual situations, some of which do not necessarily entail a conflict of interest between public-entity plaintiffs and private attorneys retained under contingent fee agreements. To limit *Clancy* is thus appropriate, as the majority concludes.

In this case, however, at least a possible conflict of interest arises from the combination of two circumstances: The public entities assert they cannot afford to pay private counsel other than a contingent fee, and some of the fee agreements at issue give private counsel a share of the value of any abatement ordered by the court. Given the hypothetical choice between an abatement order of great public value and a less valuable cash settlement,[1] both the public

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* Associate Justice, Court of Appeal, First Appellate District, Division Two, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

[1] The government cannot recover damages in public nuisance cases. (*People ex rel. Van de Kamp v. American Art Enterprises,*

and the private attorneys have an incentive to advocate the less valuable cash settlement, as it provides funds from which private counsel can be paid without an appropriation of public money representing the private attorneys' share of the value of abatement. Certainly this incentive does not amount to a personal conflict of interest requiring the public attorneys' recusal, as the majority explains (maj. opn., *ante*, 112 Cal.Rptr.3d at p. 715, 235 P.3d at p. 36-37), but it does lead me to question whether public attorneys under all foreseeable circumstances will be able to exercise the independent supervisory judgment the majority concludes is essential if private counsel are to be retained under contingent fee agreements. Here, however, the parties' briefing on the subject of possible remedies is so vague, any such conflict is merely speculative.

In concurring in the judgment, I am also influenced by the concern that to grant defendants' motion might encourage parties in future cases to bring belated motions seeking to interfere with their opposing parties' attorney-client relationships for tactical reasons. Although plaintiffs commenced this action in 2000, and although defendants do not assert they learned of the contingent fee agreements only recently,[2] defendants did not challenge those agreements until 2007, after losing pretrial dispositive

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Inc. (1983) 33 Cal.3d 328, 333, fn. 11, 188 Cal.Rptr. 740, 656 P.2d 1170.)

[2] Plaintiff City and County of San Francisco's contingent fee agreement, for example, has been public knowledge since 2001, when the Board of Supervisors authorized the City Attorney to enter into it. (S.F. Res. No. 190-01, as amended Feb. 13, 2001.)

motions on appeal.[3] (See *County of Santa Clara v. Atlantic Richfield Co.* (2006) 137 Cal.App.4th 292, 40 Cal.Rptr.3d 313.) In ruling on a motion to disqualify counsel, the court may properly consider the possibility that the motion is a tactical device (*People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1145, 86 Cal.Rptr.2d 816, 980 P.2d 371; *Comden v. Superior Court* (1978) 20 Cal.3d 906, 915, 145 Cal.Rptr. 9, 576 P.2d 971) and deny the motion when unreasonable delay has caused great prejudice (*In re Complex Asbestos Litigation* (1991) 232 Cal.App.3d 572, 599-600, 283 Cal.Rptr. 732; *River West, Inc. v. Nickel* (1987) 188 Cal.App.3d 1297, 1313, 234 Cal.Rptr. 33). To grant defendants' motion in this case could as a practical matter force plaintiffs to abandon their lawsuit after nearly a decade of pretrial litigation and discovery. While defendants have asked the court not to *disqualify* plaintiffs' counsel but instead simply to bar plaintiffs from *compensating* counsel on a contingent basis, the only authority for defendants' motion is the body of law concerning disqualification. Because there is evidence indicating that an order prohibiting contingent fees would as a practical matter preclude private counsel's participation—in effect disqualifying them—the rule requiring timely presentation of the motion would logically apply.

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[3] I recognize that until 2007 the complaint included additional causes of action that did not implicate contingent fee concerns, but this would not have precluded an earlier motion to prohibit contingent fee arrangements with respect to the public nuisance cause of action.

I CONCUR: RIVERA, J.*

* Associate Justice, Court of Appeal, First Appellate District, Division Four, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

APPENDIX B

COURT OF APPEAL,
SIXTH DISTRICT, CALIFORNIA.

No. H031540.

COUNTY OF SANTA CLARA *et al.*,
Petitioners,

v.

THE SUPERIOR COURT OF SANTA CLARA COUNTY,
Respondent;

ATLANTIC RICHFIELD COMPANY *et al.*,
Real Parties in Interest.

April 8, 2008.
Review Granted July 23, 2008.

MIHARA, J.

A group of public entities are prosecuting a representative public nuisance action against a group of companies that manufactured lead paint. This action seeks abatement as the sole remedy, and it has not yet proceeded to trial. The companies filed a motion seeking to bar the public entities from compensating their private counsel by means of contingent fees. The superior court, relying on *People ex rel. Clancy v. Superior Court* (1985) 39 Cal.3d 740, 218 Cal.Rptr. 24, 705 P.2d 347 (*Clancy*), issued an order barring the public entities from compensating their private counsel by means of any contingent fee agreement. The public entities seek writ relief from the superior

court's order. They assert that *Clancy* does not bar *all* contingent fee agreements in public nuisance abatement actions, and that *their* contingent fee agreements are valid. We conclude that *Clancy* does not bar the public entities' contingent fee agreements with their private counsel, and we issue a writ of mandate directing the superior court to vacate its order and issue a new order denying the companies' motion.

I. Background

The public entities' action against the companies originally included causes of action for fraud, strict liability, negligence, unfair business practices, and public nuisance.[1] (*County of Santa Clara v. Atlantic Richfield Co.* (2006) 137 Cal.App.4th 292, 300, 40 Cal.Rptr.3d 313 (*Santa Clara I*).) In March 2006, this court reversed the superior court's judgment of dismissal and ordered the superior court to reinstate the representative public nuisance cause of action and the negligence, strict liability, and fraud causes of action. (*Santa Clara I*, at p. 333, 40 Cal.Rptr.3d 313.) In January 2007, the public entities filed a motion seeking leave to file a proposed fourth amended complaint that alleged a single representative public nuisance cause of action and sought only abatement. Throughout this litigation, the public entities have been represented by both their in-house counsel and private counsel.

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[1] The petitioners in this case are Santa Clara County (Santa Clara), San Mateo County (San Mateo), Monterey County (Monterey), Solano County (Solano), Los Angeles County (LA County), Alameda County (Alameda), City and County of San Francisco (San Francisco), City of Oakland (Oakland), City of Los Angeles (LA City), and City of San Diego (San Diego).

In February 2007, the companies filed a "motion to bar payment of contingent fees to private attorneys." They asserted that "the government cannot retain a private attorney on a contingent fee basis to litigate a public nuisance claim." The companies sought "an order that precludes plaintiffs from retaining outside counsel under any agreement in which payment of fees and costs is contingent on the outcome of the litigation."

The companies attached to their motion a number of fee agreements between the public entities and their private counsel, and the public entities filed opposition to which they attached their fee agreements and declarations from their in-house and private counsel. The fee agreements and declarations disclose that the public entities and private counsel agreed that, other than $150,000 that would be forwarded by Santa Clara toward costs, private counsel would pay all further costs and would not receive any fees unless the action was successful. If the action succeeded, private counsel could seek a court award of costs and would be entitled to recover any unrecompensed costs from the "recovery" and a fee of 17% of the "net recovery."

The fee agreements provide different definitions of "recovery." Some of the agreements define "recovery" as "moneys other than civil penalties," while others define "recovery" as the "amount recovered, by way of judgment, settlement, or other resolution." Some of the agreements include "both monetary and non-monetary" in their definitions of "recovery." The San Diego agreement defines "net recovery" as "the payment of money, stock, and/or in the value of the abatement remedy after the deduction of the costs paid or to be paid." The Santa Clara fee agreement

provides that, "[i]n the event that the Litigation is resolved by settlement under terms involving the provision of goods, services or any other 'in-kind' payment, the Santa Clara County Counsel agrees to seek, as part of any such settlement, a mutually agreeable monetary settlement of attorneys' fees and expenses."

In April 2007, the superior court heard both the companies' motion "to bar payment" and the public entities' motion for leave to file the fourth amended complaint. The court granted the public entities' motion for leave to file the fourth amended complaint and ordered that the pleading be filed within 30 days.

Although there were some preliminary issues about the "ripe[ness]" of the companies' motion, the superior court resolved the motion on its merits.[2]

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[2] At the hearing, the superior court noted that it was "somewhat puzzled as to what a contingent fee would be based upon if you're not permitted to [re]cover damages. . . ." The court noted that attorney's fees were not available in this type of public nuisance abatement action. "The fact that . . . you may not recover damages for a public nuisance that may be abated seems to me would eliminate the-the necessity of having the value-of having a contingent fee agreement with counsel. . . ."

The public entities asserted that the motion was not "ripe" because it could not be predicted what type of remedy or fees would be available. Private counsel for the public entities asserted that "[i]f there is no recovery in this case from any monetary funds, the people who are going to suffer here are the folks who are assisting county counsel. We believe at this time since we have not had the benefit of analyzing what the remedies are going to be for this type of abatement we can't forecast that." "The risk truly is on private counsel. We may never see a nickel from the case."

The attorney for the companies admitted that, "[o]n the question of non ripeness," he was "confused about the common fund issue and where a contingency might come from." "Now if

The court rejected the public entities' claim that *Clancy* was distinguishable. The court concluded that, under *Clancy*, "outside counsel must be precluded from operating under a contingent fee agreement, regardless of the government attorneys' and outside attorneys' well-meaning intentions to have all decisions in this litigation made by the government attorneys." The court granted the companies' motion and "preclud[ed] Plaintiffs from retaining outside counsel under any agreement in which the payment of fees and costs is contingent on the outcome of the litigation. . . ." The court allowed the public entities "30 days to file with the court new fee agreements" or "declarations detailing the fee arrangements with outside counsel."

The public entities sought a writ of mandate in this court, and the superior court stayed the matter pending resolution of this writ proceeding. This court issued an order to show cause on the writ petition, the companies filed a return, and the public entities filed a reply.[3]

II. Discussion

The public entities claim that the superior court erred in categorically precluding contingent fee agreements. They maintain that *Clancy* does not categorically bar the retention of private counsel to represent a public entity in a public nuisance abatement action under a contingent fee agreement. The public entities contend that their engagement of

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the plaintiffs ultimately figure out a way to have a pot of money against which a seventeen percent contingency could apply," the contingency fee would be a "vast[ ]" amount of money.

[3] Numerous amicus curiae briefs have also been filed in this proceeding.

private counsel under contingent fee agreements in this action falls outside the scope of *Clancy*'s holding.

A. Propriety of Writ Review

In this case, the companies, for whatever reason, did not style their motion as a motion to *disqualify* the public entities' private counsel.[4] While an order *disqualifying* counsel is an *appealable* order (*Chronometrics, Inc. v. Sysgen, Inc.* (1980) 110 Cal.App.3d 597, 599, fn. 1, 168 Cal.Rptr. 196), the order issued by the superior court granting the companies' motion was not appealable because it did not explicitly disqualify the public entities' private counsel. Instead, it precluded the public entities from employing their private counsel *under any contingent fee arrangements*.

"It would be naive not to recognize that the motion to disqualify opposing counsel is frequently a tactical device to delay litigation." (*Comden v. Superior Court* (1978) 20 Cal.3d 906, 915, 145 Cal.Rptr. 9, 576 P.2d 971.) In this case, the companies' motion threatened not only to deprive the public entities of their choice of counsel but also to preclude them from pursuing any appellate remedies. Writ review of this order is appropriate because appellate review is unavailable, and any error in the order would result in unjustifiably depriving the public entities of their right to counsel of choice.

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[4] The attorney for the companies asserted at the hearing on the motion that the companies "do not ask for disqualification" but only that "the paying of contingency fees be barred."

B. *Clancy*

We begin with *Clancy*, since *Clancy* was the basis for the superior court's ruling. In *Clancy*, the City of Corona (Corona) had hired James Clancy, a private attorney, to bring nuisance abatement actions against businesses selling obscene publications in violation of a city ordinance. (*Clancy*, *supra*, 39 Cal.3d at p. 743, 218 Cal.Rptr. 24, 705 P.2d 347.) The employment contract between Corona and Clancy, who was an independent contractor rather than an employee, provided that Clancy was to be paid $60 per hour for his work in bringing public nuisance actions, but he would be paid only $30 per hour for his work in any public nuisance action in which Corona did not prevail or in which Corona prevailed but did not recover its attorney's fees. (*Clancy*, at pp. 745, 747, 218 Cal.Rptr. 24, 705 P.2d 347.)

Clancy, acting as a "special" City Attorney, filed a public nuisance complaint against a bookstore and its operator seeking abatement, a declaratory judgment and an injunction. (*Clancy*, *supra*, 39 Cal.3d at p. 744, 218 Cal.Rptr. 24, 705 P.2d 347.) The bookstore operator unsuccessfully sought to disqualify Clancy as attorney for Corona. (*Ibid.*) The bookstore operator then sought writ relief, contending that it was "improper for an attorney representing the government to have a financial stake in the outcome of an action to abate a public nuisance" and asserting that "a government attorney prosecuting such actions must be neutral, as must an attorney prosecuting a criminal case." (*Clancy*, at p. 745, 218 Cal.Rptr. 24, 705 P.2d 347.)

The California Supreme Court recognized that "there is a class of civil actions that demands the representative of the government to be absolutely

neutral. This requirement precludes the use in such cases of a contingent fee arrangement." (*Clancy*, *supra*, 39 Cal.3d at p. 748, 218 Cal.Rptr. 24, 705 P.2d 347.) "[A] lawyer cannot escape the heightened ethical requirements of one who performs governmental functions merely by declaring he is not a public official. The responsibility follows the job: if Clancy is performing tasks on behalf of and in the name of the government to which greater standards of neutrality apply, he must adhere to those standards." (*Clancy*, at p. 747, 218 Cal.Rptr. 24, 705 P.2d 347.)

The first question was whether a public nuisance abatement action fell within the class of civil cases in which the government's representative must be absolutely neutral. The court noted that ordinary civil cases brought by the government do not fall within this class of cases, and therefore contingent fee arrangements in ordinary civil cases are permitted.[5] (*Clancy*, *supra*, 39 Cal.3d at p. 748, 218 Cal.Rptr. 24, 705 P.2d 347.) However, public nuisance abatement actions differ from ordinary civil actions brought by the government. "[T]he abatement of a public nuisance involves a balancing of interests. On the one hand is the interest of the people in ridding their city of an obnoxious or dangerous condition; on the other hand is the interest of the landowner in using his property as he wishes. And when an establishment such as an adult bookstore is the subject of the abatement action, something more is

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[5] "Nothing we say herein should be construed as preventing the government, under appropriate circumstances, from engaging private counsel. Certainly there are cases in which a government may hire an attorney on a contingent fee to try a[n ordinary] civil case." (*Clancy*, *supra*, 39 Cal.3d at p. 748, 218 Cal.Rptr. 24, 705 P.2d 347.)

added to the balance: not only does the landowner have a First Amendment interest in selling protected material, but the public has a First Amendment interest in having such material available for purchase. Thus, as with an eminent domain action [to which the absolute neutrality requirement applies], the abatement of a public nuisance involves a delicate weighing of values. Any financial arrangement that would tempt the government attorney to tip the scale cannot be tolerated." (*Clancy*, at p. 749, 218 Cal.Rptr. 24, 705 P.2d 347.) Since public nuisance abatement actions generally involve "a delicate weighing of values" and "balancing of interests," such actions fall within the class of civil cases in which the government's representative must be absolutely neutral.

The next question was whether the need for the government's representative in a public nuisance abatement action to be absolutely neutral precluded Clancy from prosecuting Corona's public nuisance abatement action against the bookstore operator under the contingent fee arrangement. The court concluded that this contingent fee arrangement precluded Clancy from being absolutely neutral. "Clancy has an interest in the result of the case: his hourly rate will double if the City is successful in the litigation. Obviously this arrangement gives him an interest extraneous to his official function in the actions he prosecutes on behalf of the City." (*Clancy*, *supra*, 39 Cal.3d at pp. 747-748, 218 Cal.Rptr. 24, 705 P.2d 347.) "[W]e hold that the contingent fee arrangement between the City and Clancy is antithetical to the standard of neutrality that an attorney representing the government must meet when prosecuting a public nuisance abatement action. In the interests of justice, therefore, we must order Clancy

disqualified from representing the City in the pending abatement action." (*Clancy*, at p. 750, 218 Cal.Rptr. 24, 705 P.2d 347.) The court expressly noted that Corona was not precluded from rehiring Clancy to represent it on other terms. (*Clancy*, at p. 750, fn. 5, 218 Cal.Rptr. 24, 705 P.2d 347.)

C. Application of *Clancy*

As in *Clancy*, the public entities in this case have engaged the services of private counsel pursuant to contingent fee agreements under which private counsel will participate in representing the interests of the public entities in a public nuisance abatement action. The public entities argue that *Clancy*'s absolute neutrality requirement does not apply here because private counsel have *not* been engaged as the *sole* representatives of the public entities, as James Clancy was in *Clancy*, but only to *assist* the government attorneys who are prosecuting this action on behalf of the public entities. Unlike James Clancy, private counsel do not have decision-making authority and the power to control the litigation, both of which have been retained by the public entities' in-house counsel. The public entities claim that the limited and subordinate role of private counsel does not justify applying the absolute neutrality requirement to them.

It is undisputed that private counsel have been engaged to play a limited, subordinate role in this litigation. All of the public entities are represented by in-house counsel in addition to their private counsel. The fee agreements between five of the public entities and their private counsel explicitly provide that the public entities' in-house counsel "retain final

authority over all aspects of the Litigation."[6] Their private counsel submitted declarations confirming that the public entities' in-house counsel retain "complete control" of the litigation.[7] The two remaining fee agreements, those of Oakland and Solano, purport to grant private counsel "absolute discretion in the decision of who to sue and who not to sue, if anyone, and what theories to plead and what evidence to present." However, Oakland has disclaimed this fee agreement and asserts that it has retained "complete control" of this litigation and is revising its fee agreement to so reflect.[8] Solano's private

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[6] Four of the public entities submitted declarations to the effect that they had "retained and continue[d] to retain complete control of the litigation," were "actively involved in and direct[ed] all decisions related to the litigation," and have "direct oversight over the work of outside counsel." San Francisco declared that "[t]he San Francisco City Attorney's Office has in fact retained control over all significant decisions" in this case.

[7] Private counsel Cotchett, Pitre & McCarthy (Cotchett) submitted a declaration in which it stated that it had been retained by Santa Clara, Solano, Alameda, Oakland, Monterey, San Mateo, and San Diego. Cotchett asserted that the public entities' in-house counsel "have maintained and continue to maintain complete control over all aspects of the litigation" and "all decision making authority and responsibility." Private counsel Thornton & Naumes, private counsel Motley, Rice, and private counsel Mary E. Alexander submitted declarations asserting that they had been retained by San Francisco to assist in this litigation. They asserted that San Francisco's City Attorney "has retained complete control over this litigation" and has "exercised full decision-making authority and responsibility."

[8] Oakland submitted a declaration by a city attorney that: "Notwithstanding any documents suggesting the contrary, the Office of the City Attorney has retained complete control over the prosecution of the public nuisance cause of action in this case as it relates to the interests of the People of the City of

counsel asserts that Solano's in-house counsel has "maintained and continue[s] to maintain complete control over all aspects of the litigation" and "all decision making authority and responsibility." The record before us does not contain any fee agreements between the remaining three public entity petitioners and any private counsel.[9]

The public entities have therefore established that their private counsel serve in a subordinate role in which private counsel merely assist in-house counsel

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Oakland." Oakland asserted that it was "in the process of revising" its fee agreement "so that it reflects the reality of the relationship" between Oakland and its private counsel.

[9] Seven separate fee agreements between the various public entity petitioners and their private counsel were before the superior court and are before us. These fee agreements are between private counsel and Santa Clara, Monterey, San Francisco, Solano, Oakland, Alameda, and San Diego.

No fee agreements are before us involving LA City, LA County or San Mateo. LA City submitted a declaration below stating that it has not yet joined the litigation and has not retained private counsel, although it anticipates joining the litigation and needing the services of private counsel.

San Mateo did not submit a fee agreement, but it submitted a declaration by its in-house counsel in which in-house counsel asserted that it "has retained and continues to retain complete control of the litigation and retains final authority over all aspects of the litigation." The declaration stated that a fee agreement was attached, but no such attachment appears in petitioners' appendix of exhibits. However, Cotchett's declaration confirmed that it had been retained by San Mateo and that San Mateo retained "complete control over all aspects of the litigation" and "all decision making authority and responsibility."

Nothing in the record before us indicates that LA County has retained private counsel to represent it in this litigation or contemplates doing so.

and lack any authority to control the litigation. The only remaining question is whether the limited role of private counsel renders inapplicable *Clancy*'s absolute neutrality requirement. While *Clancy* contains language suggesting that it is establishing a broad rule banning contingent fee agreements with private counsel in public nuisance abatement actions, we are bound by only the *holding* in *Clancy*, not all of its language.

"We acknowledge, as we must, that we are bound to follow binding precedent of a higher court, and that the refusal to do so is in excess of our own jurisdiction. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455-456 [20 Cal.Rptr. 321, 369 P.2d 937].) However, we are not bound by dicta. . . . In every case, it is necessary to read the language of an opinion in the light of its facts and the issues raised, in order to determine which statements of law were necessary to the decision, and therefore binding precedent, and which were general observations unnecessary to the decision. The latter are dicta, with no force as precedent." (*Fireman's Fund Ins. Co. v. Maryland Casualty Co.* (1998) 65 Cal.App.4th 1279, 1300-1301, 77 Cal.Rptr.2d 296.)

"It is a foundational principle that: '"[T]he language of an opinion must be construed with reference to the facts presented by the case, and the positive authority of a decision is coextensive only with such facts."' [Citations.] 'A litigant cannot find shelter under a rule announced in a decision that is inapplicable to a different factual situation in his own case, nor may a decision of a court be rested on quotations from previous opinions that are not pertinent by reason of dissimilarity of facts in the cited cases and in those in the case under consideration.'"

(*Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1157, 278 Cal.Rptr. 614, 805 P.2d 873.)

The California Supreme Court's holding in *Clancy* must be construed with reference to the facts presented in *Clancy*, and the binding authority of *Clancy* is limited to the facts upon which the California Supreme Court rested its holding. James Clancy was serving as Corona's *sole* representative in its public nuisance abatement action and had *complete control* over the litigation. *Clancy*'s holding was based on the rationale that, where private counsel are "performing tasks on behalf of and in the name of the government" in a public nuisance abatement action in which there must be a "balancing of interests," private counsel must be absolutely neutral and cannot be compensated by a contingent fee arrangement, because private counsel's financial interest might "tip the scale" on which these interests are balanced. (*Clancy*, *supra*, 39 Cal.3d at pp. 747, 748, 749, 218 Cal.Rptr. 24, 705 P.2d 347.)

In contrast, where private counsel are merely *assisting* government attorneys in the litigation of a public nuisance abatement action and are explicitly serving in a *subordinate* role, in which private counsel *lack any decision-making authority or control*, private counsel are not *themselves* acting "in the name of the government" and have no role in the "balancing of interests" that triggers the absolute neutrality requirement. Private counsel serving in such a subordinate role do not supplant the public entities' in-house attorneys, who must be absolutely neutral, and are not in a position where their interest in maximizing their contingent fee can influence the balancing of interests or any of the other decisions that are made exclusively by the public entities' in-

house attorneys. Because *Clancy*'s holding is limited to the facts that were before the California Supreme Court in *Clancy*, a private attorney serving as the sole representative of the government in a public nuisance abatement action and completely controlling the litigation, *Clancy* does not justify the superior court's order barring the public entities from compensating, by means of a contingent fee agreement, their private counsel, who are merely assisting in-house counsel and lack any control over the litigation.[10]

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[10] The concurring opinion posits that it is a "factual determination that must be made on a case-by-case basis" whether private counsel may assist in the representation of a public entity under a contingent fee agreement in a public nuisance case. This case is not an appropriate vehicle for us to opine on the precise nature of the decision that a superior court would be required to make in a case in which there were factual disputes regarding the nature of the fee agreement or the relationship between private counsel and a public entity.

The issue before us in this writ proceeding was presented to the superior court on undisputed facts and was resolved by the court as a pure question of law. Although it was undisputed that private counsel were engaged solely to assist in-house counsel in representing the public entities, with in-house counsel retaining complete control over the litigation, the superior court, relying solely on *Clancy*, ruled that contingent fee agreements between public entities and private counsel were categorically barred in public nuisance cases.

Because the superior court resolved the sole issue presented in this writ proceeding as a matter of law, and it is presented to us as a matter of law, this case does not present the issue that the concurring opinion purports to resolve. Whether, in a case in which there are disputed facts, a superior court primarily makes a factual determination or primarily exercises its discretion in deciding whether to permit private counsel to represent a public entity under a contingent fee agreement in a public nuisance action is a question not presented in this case. Resolution of that

D. Other Cases

Since *Clancy* does not support the superior court's order, we must consider whether any other authority does.

None of the other cases cited by the companies provides any support for the superior court's order. In *Tumey v. State of Ohio* (1927) 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (*Tumey*), Tumey was arrested for unlawful possession of alcohol and tried by the mayor of the village, who had the power to ascertain guilt and set the amount of the fine. The mayor would be paid $12 out of the fine if Tumey was convicted, but would receive no funds if Tumey was not convicted. (*Tumey*, at pp. 520, 523, 533, 47 S.Ct. 437.) The United States Supreme Court concluded that it was a violation of due process for the mayor to adjudge Tumey's culpability because the mayor had a pecuniary interest in the outcome. "That officers acting in a judicial or quasi judicial capacity are disqualified by their interest in the controversy to be decided is of course the general rule." (*Tumey*, at p. 521, 47 S.Ct. 437.) "[I]t certainly violates the Fourteenth Amendment and deprives a defendant in a criminal case of due process of law to subject his liberty or property to the judgment of a court, the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case." (*Tumey*, at p. 523, 47 S.Ct. 437.) "It is certainly not fair to each defendant brought before the mayor for the careful and judicial consideration of

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question must await a case in which it is presented and would necessarily require resolution of the appropriate standard of review for this court to exercise in such a case. As these issues are not before us here, we express no opinion on them.

his guilt or innocence that the prospect of such a prospective loss by the mayor should weigh against his a[c]quittal." (*Tumey*, at p. 532, 47 S.Ct. 437.) Because *Tumey* was solely concerned with the financial interest of the *adjudicator*, it is not relevant to the financial interest of private counsel assisting in the *prosecution* of a proceeding. Private counsel here are not playing an adjudicative role in the proceedings.

Ward v. Village of Monroeville, Ohio (1972) 409 U.S. 57, 93 S.Ct. 80, 34 L.Ed.2d 267 (*Ward*), like *Tumey*, found a due process violation where a mayor served as the adjudicator. The only difference between *Ward* and *Tumey* was that the mayor in *Ward* did not *personally* benefit from conviction, but had an interest in conviction because the fines funded the village's budget. In *Marshall v. Jerrico, Inc.* (1980) 446 U.S. 238, 100 S.Ct. 1610, 64 L.Ed.2d 182 (*Marshall*), the United States Supreme Court concluded that "that the strict requirements of *Tumey* and *Ward* are not applicable to the determinations of the assistant regional administrator, whose functions resemble those of a prosecutor more closely than those of a judge." (*Marshall*, at p. 243, 100 S.Ct. 1610.) Thus, the "strict requirements" of *Tumey* and *Ward* apply only to adjudicators, not to those who are functioning like prosecutors.

The public entities note that *Clancy* distinguished *Sedelbauer v. State* (1983) 455 N.E.2d 1159 (*Sedelbauer*). In a footnote responding to James Clancy's reliance on *Sedelbauer*, the California Supreme Court briefly noted that *Sedelbauer* "approved the assistance of a private attorney only because he appeared 'not in place of the State's duly authorized counsel.'" (*Clancy, supra*, 39 Cal.3d at p. 749, fn. 3, 218 Cal.Rptr.

24, 705 P.2d 347.) In *Sedelbauer*, the Indiana appellate court found no error in the fact that a private attorney with a private interest in the suppression of pornography had served as cocounsel in a criminal obscenity prosecution and "appeared *with* a deputy prosecuting attorney, and not in place of the State's duly authorized counsel." (*Sedelbauer*, at p. 1164.) We agree with the public entities that *Clancy*'s treatment of *Sedelbauer* suggests that there is a critical distinction between a private attorney who *supplants* the public entity's "duly authorized counsel" and a private attorney who serves only in a *subordinate* role as "co-counsel" to the public entity's in-house counsel.

Two other cases relied on by the public entities also provide some support for their claim that absolute neutrality is not required of private counsel who are merely assisting in-house counsel and have no control over the litigation.

In *Philip Morris Inc. v. Glendening* (1998) 349 Md. 660, 709 A.2d 1230 (*Glendening*), the State of Maryland entered into a contingent fee agreement with private counsel to pursue a tort action against tobacco companies. Private counsel would be paid only out of a "money judgment," and there was no indication that the action would include a public nuisance abatement cause of action. (*Glendening*, at pp. 1231-1233.) The tobacco companies sought to invalidate the contingent fee agreement. The Maryland Court of Appeals distinguished *Clancy* in its ruling validating the agreement. "[N]o constitutional or criminal violations [are] directly implicated here, and, hence, there is no potential conflict of interest. Also, and more important, notably absent from *Clancy* is a legislative enactment authorizing the

'special employment' of outside counsel in 'extraordinary' cases. Equally important, is the absence of the oversight of an elected State official, who 'shall have the authority to control all aspects of [outside counsel's] handling of the litigation,' and whose 'authority shall be final, sole and unreviewable.' [Citation.] These, we believe, are significant material distinctions which permit a finding that the instant contingency fee contract is not violative of due process or public policy." (*Glendening,* at pp. 1242-1243.) Although *Glendening* was not a public nuisance abatement action, the fact that it distinguished *Clancy* in part on the ground that control would be exercised by the state rather than by private counsel supports our conclusion that absolute neutrality is not required of private counsel here.

In *City and County of San Francisco v. Philip Morris, Inc.* (N.D.Cal.1997) 957 F.Supp. 1130 (*CCSF*), tobacco company defendants, relying on *Clancy*, sought to disqualify the private attorneys hired by the public entity plaintiffs to assist in the prosecution of a lawsuit. The lawsuit alleged a variety of causes of action, but it did not include any public nuisance abatement cause of action. (*CCSF*, at pp. 1134-1135.) The federal district court distinguished *Clancy* and refused to disqualify the private attorneys. (*CCSF*, at pp. 1135-1136.) "[The private attorneys are] acting here as co-counsel, with plaintiffs' respective government attorneys retaining full control over the course of the litigation. Because plaintiffs' public counsel are actually directing this litigation, the Court finds that the concerns expressed in *Clancy* regarding overzealousness on the part of private counsel have been adequately addressed. . . . [¶] The Court also finds that the civil tort nature of this action meaningfully distinguishes it from *Clancy*. This

lawsuit, which is basically a fraud action, does not raise concerns analogous to those in the public nuisance or eminent domain contexts discussed in *Clancy*. Plaintiffs' role in this suit is that of a tort victim, rather than a sovereign seeking to vindicate the rights of its residents or exercising governmental powers. [¶] Finally, the case as it stands now will not require the private attorneys to argue about the policy choices or value judgments suggested by defendants regarding the regulation of tobacco. Rather, plaintiffs' attorneys simply will be arguing, as they likely have in many other cases for private sector clients, that a tort has been committed against their clients." (*CCSF*, at p. 1135.)

While the litigation in *CCSF* was not a public nuisance abatement action, and the court distinguished *Clancy* on that ground, the court also distinguished *Clancy* on the ground that the private attorneys would not be controlling the litigation, which would be controlled by the public entities' in-house counsel. Thus, *CCSF* too provides some support for our conclusion that absolute neutrality is not required where private counsel serve in a subordinate role and lack any control over the litigation.

E. Conclusion

Clancy itself does not bar the public entities from engaging private counsel under a contingent fee arrangement to assist in this litigation, so long as the public entities' in-house counsel retain control over all decision-making. The record before us contains absolutely no evidence that private counsel have ever engaged in any conduct that invaded the sphere of control exercised by the public entities' in-house

counsel.[11] No authority supports barring private counsel from assisting the public entities under a contingent fee arrangement in this litigation. Therefore, the superior court's order is unjustified, and we will direct the court to set it aside.

III. Disposition

Let a writ of mandate issue commanding the superior court to set aside its order granting the companies' motion and to enter a new order denying the motion. The public entities shall recover their costs.

I CONCUR: McADAMS, J.BAMATTRE-MANOUKIAN, J., Concurring.

I concur in the result reached in the majority opinion that the California Supreme Court's decision in *People ex rel. Clancy v. Superior Court* (1985) 39 Cal.3d 740, 218 Cal.Rptr. 24, 705 P.2d 347 (*Clancy*) does not bar the public entity plaintiffs in this case from retaining private counsel under their current contingency fee agreements to assist the government attorneys in the litigation of this public nuisance abatement action. I write separately to express my view that the determination of whether a contingency fee agreement between a public entity and private counsel is barred in a public nuisance abatement action is a factual determination that must be made on a case-by-case basis.

Our Supreme Court has instructed that prosecutorial neutrality is required in a public entity's prosecution of a public nuisance abatement action.

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[11] No doubt the companies will seek disqualification of the public entities' private attorneys if they acquire evidence that the private attorneys are improperly exercising control over this action.

(*Clancy, supra*, 39 Cal.3d at pp. 748-749, 218 Cal. Rptr. 24, 705 P.2d 347.) To ensure that a contingency fee agreement is not "antithetical to the standard of neutrality that an attorney representing the government must meet when prosecuting a public nuisance abatement action" (*id.* at p. 750, 218 Cal.Rptr. 24, 705 P.2d 347), I believe the court must review the factual circumstances of each case to determine whether, as a result of the contingency fee agreement, "the prosecutor's *discretionary decision-making* has been placed within the influence or control of an interested party" (*Hambarian v. Superior Court* (2002) 27 Cal.4th 826, 841, 118 Cal.Rptr.2d 725, 44 P.3d 102 (*Hambarian*)) or is subject to "conflicting personal interests" (*People v. Superior Court* (*Greer*) (1977) 19 Cal.3d 255, 267, 137 Cal.Rptr. 476, 561 P.2d 1164).

As I will explain, my conclusion that a case-by-case factual determination is required derives from a careful review of the decision in *Clancy* and other decisions of the California Supreme Court, as well as decisions of the federal and state courts. I have also carefully considered the important public policy issues addressed in *Clancy* and in the helpful briefs of the parties and the amicus curiae.[1]

I also write separately to recognize the court's inherent power to review contingency fee agreements

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[1] *Amicus* briefs were filed by the American Chemistry Council; the Association of California Water Agencies; the Chamber of Commerce of the United States and the American Tort Reform Association (joint brief); the Civil Justice Association of California; the California State Association of Counties and the League of California Cities (joint brief); and Public Justice, P.C., Healthy Children Organizing Project; and the Western Center for Law and Poverty (joint brief).

(*Roa v. Lodi Medical Group, Inc.* (1985) 37 Cal.3d 920, 933, 211 Cal.Rptr. 77, 695 P.2d 164), which will allow the trial court to oversee the propriety of the contingency fee agreements in this case throughout the course of the litigation.

A. *The Clancy Decision*

The contingency fee agreement at issue in *Clancy* was between a private attorney, James Clancy, and the City of Corona (City). Included in Clancy's employment contract with the City was a fee agreement providing that "Clancy is to be paid $60 per hour, 'provided, however, that with respect to each and every suit undertaken by Attorney hereunder which results in a final judgment against City, said fee shall be reduced to $30.00 per hour . . . and provided further that said fee of $60.00 shall also be reduced to $30.00 per hour . . . in each and every suit undertaken by Attorney hereunder in which City is a successful party if and to the extent that the City does not recover its attorney's fees from the unsuccessful party or parties.'" (*Clancy, supra*, 39 Cal.3d at p. 745, 218 Cal.Rptr. 24, 705 P.2d 347.)

After the City adopted a resolution declaring a business selling sexually explicit materials, known as the "Book Store," to be a public nuisance, Clancy, on behalf of the City as its "'special attorney,'" filed a complaint against the Book Store and its owners for abatement of a public nuisance, declaratory judgment, and an injunction. (*Clancy, supra*, 39 Cal.3d at pp. 743-744, 218 Cal.Rptr. 24, 705 P.2d 347.) City later amended its complaint to substitute "'City Attorney of Corona'" as Clancy's title in the action. (*Id.* at p. 744, 218 Cal.Rptr. 24, 705 P.2d 347.) The trial court denied the defendants' motion to disqualify Clancy as attorney for the City, and the defen-

dants subsequently sought a writ of prohibition from the California Supreme Court "to bar the People from proceeding with Clancy instead of the regular City Attorney of Corona as its representative. . . ." (*Ibid.*) The defendants contended that it was improper for Clancy to have a financial stake in the outcome because an attorney prosecuting a public nuisance action must be neutral.

To determine whether Clancy should be disqualified, the California Supreme Court evaluated "the propriety of a contingent fee agreement between a city government and a private attorney whom it hired to bring abatement actions under the city's nuisance ordinance." (*Clancy, supra*, 39 Cal.3d at p. 743, 218 Cal.Rptr. 24, 705 P.2d 347.) The court began its evaluation by examining the requirement of neutrality for public prosecutors in criminal prosecutions and government attorneys in eminent domain actions. (*Clancy, supra*, 39 Cal.3d at pp. 748-749, 218 Cal.Rptr. 24, 705 P.2d 347.) Regarding criminal prosecutions, the *Clancy* court noted that "[c]ontingent fee contracts for criminal prosecutors have been recognized to be unethical and potentially unconstitutional. . . ." (*Id.* at p. 748, 218 Cal.Rptr. 24, 705 P.2d 347.) The court then determined that "[t]he justification for the prohibition against contingent fees in criminal actions extends to certain civil cases." (*Ibid.*) The "certain civil cases" included eminent domain actions, because the government attorney in an eminent domain action occupies "'a position analogous to a public prosecutor'" and is therefore "'"possessed . . . of important governmental powers that are pledged to the accomplishment of one objective only, that of impartial justice." [Citation.]'" (*Id.* at pp. 748-749, 218 Cal.Rptr. 24, 705 P.2d 347.)

The requirement of a neutral prosecuting attorney also extended to public nuisance abatement actions, the *Clancy* court reasoned, because a public nuisance abatement action is similar to an eminent domain action. Both types of actions involve a balancing of the interests of the public and the landowner. (*Clancy*, *supra*, 39 Cal.3d at p. 749, 218 Cal.Rptr. 24, 705 P.2d 347.) "Thus, as with an eminent domain action, the abatement of a public nuisance involves a delicate weighing of values. Any financial arrangement that would tempt the government attorney to tip the scale cannot be tolerated." (*Id.* at p. 749, 218 Cal.Rptr. 24, 705 P.2d 347.)

Moreover, the *Clancy* court observed, "[p]ublic nuisance abatement actions share the public interest aspect of eminent domain and criminal cases, and often coincide with criminal prosecutions." (*Clancy*, *supra*, 39 Cal.3d at p. 749, 218 Cal.Rptr. 24, 705 P.2d 347.) "A suit to abate a public nuisance can trigger a criminal prosecution of the owner of the property. This connection between the civil and criminal aspects of public nuisance law further supports the need for a neutral prosecuting attorney" (*Ibid.*, fn. omitted.)

Having determined that a neutral prosecuting attorney was required in a public nuisance abatement action, the *Clancy* court examined Clancy's contingency fee agreement to evaluate whether prosecutorial neutrality would be maintained in the City's public nuisance action against the Book Store. The court found that Clancy had "an interest in the result of the case: his hourly rate will double if the City is successful in the litigation. Obviously this arrangement gives him an interest extraneous to his official function in the actions he prosecutes on behalf

of the City." (*Clancy*, *supra*, 39 Cal.3d at pp. 747-748, 218 Cal.Rptr. 24, 705 P.2d 347.) Consequently, the court held that Clancy should be disqualified because his contingency fee agreement was "antithetical to the standard of neutrality that an attorney representing the government must meet when prosecuting a public nuisance abatement action." (*Id.* at p. 750, 218 Cal.Rptr. 24, 705 P.2d 347.)

The *Clancy* court issued a writ of mandate that, among other things, directed the trial court to issue an order dismissing Clancy as the City's attorney in the pending public nuisance abatement action. (*Clancy*, *supra*, 39 Cal.3d at p. 750, 218 Cal.Rptr. 24, 705 P.2d 347.) However, in a footnote the court stated that "on remand the action herein should be brought in the name of Dallas Holmes, the Corona City Attorney. The City may hire Clancy to represent Holmes." (*Id.* at p. 750, fn. 5, 218 Cal.Rptr. 24, 705 P.2d 347.)

B. *The Test for Prosecutorial Neutrality*

As I have discussed, the *Clancy* court indicated, in holding that Clancy's contingency fee agreement with the City of Corona violated the standard for prosecutorial neutrality, that the standard of neutrality that applies to a government attorney in a public nuisance abatement action is the same standard that applies to a public prosecutor in a criminal action. (*Clancy*, *supra*, 39 Cal.3d at pp. 748-749, 218 Cal.Rptr. 24, 705 P.2d 347.) Therefore, for the purpose of evaluating the propriety of a contingency fee agreement in a public nuisance abatement action, decisions concerning the disqualification of a district attorney's office for a violation of the standard of neutrality are instructive.

The *Clancy* court's analysis relied in part on an earlier California Supreme Court decision, *Greer, supra*, 19 Cal.3d 255, 137 Cal.Rptr. 476, 561 P.2d 1164, for the proposition that a government attorney, like a public prosecutor, must be absolutely neutral. (*Clancy*, *supra*, 39 Cal.3d at pp. 746-747, 218 Cal.Rptr. 24, 705 P.2d 347.) In *Greer*, the defendants sought the disqualification of the district attorney on the ground that a conflict of interest existed because the victim's mother was employed in the district attorney's office. (*Greer*, *supra,* 19 Cal.3d at p. 259, 137 Cal.Rptr. 476, 561 P.2d 1164.) Our Supreme Court affirmed the trial court's order disqualifying the district attorney because the prosecutor might have an "emotional stake" in the case that could "disturb his exercise of impartial judgment in pretrial and trial proceedings." (*Id.* at p. 270, 137 Cal.Rptr. 476, 561 P.2d 1164.)

The *Greer* court's analysis of the disqualification issue was based upon the defendant's fundamental due process right not to be deprived of liberty without a fair trial and the prosecutor's obligation "to respect this mandate." (*Greer, supra*, 19 Cal.3d at p. 266, 137 Cal.Rptr. 476, 561 P.2d 1164.) "The prosecutor is a public official vested with considerable discretionary power to decide what crimes are to be charged and how they are to be prosecuted. [Citations.] In all his [or her] activities, his [or her] duties are conditioned by the fact that he [or she] "is the representative not of any ordinary party to a controversy, but of a sovereignty whose obligation is to govern impartially . . . and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.' [Citations.]" (*Ibid.*; *People v. Fierro* (1991) 1 Cal.4th 173, 208, 3 Cal.Rptr.2d 426, 821 P.2d 1302.)

In *Greer*, our Supreme Court also recognized that the requirement of prosecutorial impartiality arose from the prosecutor's discretionary powers. "[I]t is precisely because the prosecutor enjoys such broad discretion that the public he [or she] serves and those he [or she] accuses may justifiably demand that he [or she] perform his [or her] functions with the highest degree of integrity and impartiality, and with the appearance thereof." (*Greer*, *supra*, 19 Cal.3d at pp. 266-267, 137 Cal.Rptr. 476, 561 P.2d 1164.) Thus, "the advantage of public prosecution is lost if those exercising the discretionary duties of the district attorney are subject to conflicting personal interests which might tend to compromise their impartiality. In short, the prosecuting attorney '"is the representative of the public in whom is lodged a discretion which is not to be controlled by the courts, or *by an interested individual*. . . ."' [Citation.]" (*Id.* at p. 267, 137 Cal.Rptr. 476, 561 P.2d 1164.)

In *Hambarian*, *supra*, 27 Cal.4th 826, 118 Cal.Rptr.2d 725, 44 P.3d 102, our Supreme Court also addressed the issue of prosecutorial neutrality. The court considered the merits of the defendant's motion to disqualify the district attorney's office on the ground that the district attorney had accepted the services of a forensic accountant who was compensated by the victim, the City of Orange. (*Id.* at p. 829, 118 Cal.Rptr.2d 725, 44 P.3d 102.) Under Penal Code section 1424, a motion to disqualify a prosecutor on the ground of conflict of interest may not be granted unless "the evidence shows that a conflict of interest exists that would render it unlikely that the defendant would receive a fair trial." (Pen.Code, § 1424, subd. (a)(1).) The court recognized, as it did in *Greer*, that a public prosecutor is required to "act in an impartial manner"

because he or she has "broad discretion over the entire course of the criminal proceedings. . . ." (*Hambarian*, *supra*, 27 Cal.4th at pp. 839-840, 118 Cal.Rptr.2d 725, 44 P.3d 102.) Accordingly, the *Hambarian* court determined that the proper test for a disqualifying conflict of interest under Penal Code section 1424 is whether "the prosecutor's *discretionary decisionmaking* has been placed within the influence or control of an interested party." (*Id.* at p. 841, 118 Cal.Rptr.2d 725, 44 P.3d 102, fn. omitted.)

Our Supreme Court in *Hambarian* further instructed that a motion for disqualification of a district attorney's office should be reviewed on a case-by-case basis, because "no one factor will compel disqualification in all cases; 'the entire complex of facts' must be reviewed to determine 'whether the conflict makes fair and impartial treatment of the defendant unlikely.' [Citation.]" (*Hambarian*, *supra*, 27 Cal.4th at p. 834, 118 Cal.Rptr.2d 725, 44 P.3d 102; *People v. Eubanks* (1996) 14 Cal.4th 580, 599, 59 Cal.Rptr.2d 200, 927 P.2d 310.) Therefore, because the evidence showed that the forensic consultant had no control over "critical prosecutorial decisions," the *Hambarian* court determined that the motion to disqualify the district attorney's office was properly denied. (*Id.* at pp. 839, 842, 118 Cal.Rptr.2d 725, 44 P.3d 102.) Citing *Clancy*, the court explained that "recusal [of the district attorney] is not necessary to ensure [the defendant's] right to fair treatment during all portions of the criminal proceedings. [Citation.]" (*Hambarian, supra*, 27 Cal.4th at p. 840, 118 Cal.Rptr.2d 725, 44 P.3d 102.)

Review of these California Supreme Court cases clarifies that a public prosecutor may be disqualified if a case-by-case review of the factual circumstances

surrounding the claimed conflict of interest indicates that "the prosecutor's *discretionary decisionmaking* has been placed within the influence or control of an interested party" (*Hambarian, supra*, 27 Cal.4th at p. 841, 118 Cal.Rptr.2d 725, 44 P.3d 102), or is subject to "conflicting personal interests" (*Greer, supra*, 19 Cal.3d at p. 267, 137 Cal.Rptr. 476, 561 P.2d 1164). Thus, the test for a disqualifying conflict of interest may be stated as follows: where the factual circumstances in a case indicate that the public prosecutor's discretionary decisionmaking is not likely to be impartial, the standard of neutrality has been violated and the prosecutor may be disqualified.

The test for a disqualifying conflict of interest established by the California Supreme Court in *Hambarian* and *Greer* is equally applicable in civil actions, because a government lawyer in a civil action occupies "a position analogous to a public prosecutor [and] is 'possessed . . . of important governmental powers that are pledged to the accomplishment of one objective only, that of impartial justice.' [Citation.]" (*City of Los Angeles v. Decker* (1977) 18 Cal.3d 860, 871, 135 Cal.Rptr. 647, 558 P.2d 545.) Thus, "'[a] government lawyer in a civil action . . . has the responsibility to seek justice and to develop a full and fair record, and he [or she] should not use his [or her] position or the economic power of the government to harass parties or to bring about unjust settlements or results.' [Citation]." (*Ibid.*)

The California Supreme Court in *Clancy* applied the test for a disqualifying conflict of interest in a civil action when the court found that a contingency fee agreement doubling the fees of a private attorney who succeeded in prosecuting a public nuisance abatement action created a conflict of interest, due to

the private attorney's personal financial interest in the litigation. (*Clancy, supra*, 39 Cal.3d at pp. 749-750, 218 Cal.Rptr. 24, 705 P.2d 347.) The private attorney was apparently able, under his contingency fee agreement, to exercise the discretionary decisionmaking authority of a government attorney in litigating the public nuisance action, with the sole exception that the city council would decide whether to bring an action under the public nuisance ordinance. (*Id.* at p. 749, fn. 4, 218 Cal.Rptr. 24, 705 P.2d 347.) Therefore, the factual circumstances in *Clancy* demonstrated that as a result of the contingency fee agreement, the private attorney was not likely to be impartial in his discretionary decisionmaking. The *Clancy* court therefore determined that the contingency fee agreement in that case was "antithetical to the standard of neutrality that an attorney representing the government must meet when prosecuting a public nuisance abatement action." (*Id.* at p. 750, 218 Cal.Rptr. 24, 705 P.2d 347.)

C. *Federal and State Court Decisions*

Federal and state courts have also grappled with the issue of the propriety of a contingency fee agreement between a public entity and private counsel. Several decisions support a general rule that a contingency fee agreement is permitted, even though private counsel retains a financial stake in the outcome, where the agreement provides that government attorneys will maintain control over the discretionary decisionmaking throughout the litigation.

In Ohio, the federal court recently considered the Sherwin-Williams Company's challenge to the contingency fee agreements between three Ohio cities and private counsel in lead paint litigation. (*Sherwin-Williams Co. v. City of Columbus* (S.D. Ohio, July 18,

2007, No. C2-06-829, 2007 WL 2079774, 2007 U.S. Dist. Lexis 51945 (*Sherwin-Williams*).) The court's original ruling on Sherwin-Williams's motion for injunctive relief directed the cities to amend their contingency fee agreements because the court found that "the contingency fee agreements between private counsel and the three cities were unconstitutional insofar as the agreements reposed an impermissible degree of public authority upon retained counsel, who have a financial incentive not necessarily consistent with the interests of the public body." (*Id.*, 2007 WL 2079774 at p. *1, 2007 U.S. Dist. Lexis 51945 at pp. **3-4.)

In a subsequent ruling, the federal court in *Sherwin-Williams* approved the two contingency fee agreements that had been amended to expressly vest in the city attorney "control over the litigation and the sole authority to authorize any settlement of any claim or complaint." (*Sherwin-Williams*, *supra*, 2007 WL 2079774, p. *1, 2007 U.S. Dist. Lexis 51945, p. *6.) However, the court found that the third contingency fee agreement was not adequately amended because the agreement provided that neither private counsel nor the city could settle or dismiss the case without the consent of the other. (*Id.*, 2007 WL 2079774 at p. *3, 2007 U.S. Dist. Lexis 51945 at p. *10.) The court stated that it had made it "abundantly clear" in its previous ruling that a contingency fee agreement "between a municipality and private counsel in a public nuisance action which purports to vest in private counsel authority to prevent a settlement or dismissal of a suit is unconstitutional." (*Ibid.*)

In a public nuisance abatement action in California, the federal court considered the defendants' motion to disqualify private counsel on the ground that their contingency fee agreement violated the government attorney's duty of neutrality. (*City of Grass Valley v. Newmont Mining Corp.* (E.D. Cal., Nov. 20, 2007, No. 2:04-cv-00149-GEB-DAD, 2007 WL 4166238, 2007 U.S. Dist. Lexis 89187.) Relying on *Clancy,* the defendants argued that a public entity could not hire private counsel on a contingency fee basis to litigate a public nuisance abatement action. The federal court rejected this argument and denied the disqualification motion, finding that defendants had not "countered Plaintiff's showing that the City Attorney for the City of Grass Valley is acting as co-counsel in this action and the City retains 'ultimate decision-making authority in the case.' [Citation.]" (*Grass v. Newmont Mining Corp., supra,* 2007 WL 4166238, p. *1, U.S. Dist. Lexis 89187, p. *3.)

In tort litigation involving a state's claim against the tobacco industry for recovery of the health care costs of citizens with tobacco-related illnesses, the defendants also relied on *Clancy* to challenge the legality of a contingency fee agreement between a public entity and its private counsel. In *Philip Morris Inc. v. Glendening* (1998) 349 Md. 660, 709 A.2d 1230 (*Glendening*), the Maryland Court of Appeals rejected the defendants' challenge to the contingency fee agreement between the Attorney General of Maryland and the private law firm that represented the State of Maryland in tort litigation against the tobacco industry. The contingency fee agreement expressly provided that the "'Attorney General shall have the authority to control all aspects of [outside counsel's] handling of the litigation . . . [and] such authority shall be final, sole and

unreviewable.' [Citation.]" (*Id.* at p. 663, 709 A.2d 1230.)

After determining that state law authorized the Attorney General to enter into contingency fee agreements, the *Glendening* court addressed the defendants' claim that the contingency fee agreement violated due process and public policy under the principle, as illustrated in *Clancy*, that a public officer should not participate in a matter in which he or she has a personal or pecuniary interest. (*Glendening*, *supra,* 349 Md. at p. 684, 709 A.2d 1230.) The Maryland court determined that *Clancy* was distinguishable because the case before it did not directly implicate any constitutional or criminal violations. "Equally important," the court also found, was the absence in *Clancy* "of the oversight of an elected State official, who 'shall have the authority to control all aspects of [outside counsel's] handling of the litigation,' and whose 'authority shall be final, sole and unreviewable." (*Id.* at p. 686, 709 A.2d 1230.) The court therefore held that the Maryland Attorney General's oversight prevented outside counsel's financial interest in the outcome of the tobacco litigation from violating prosecutorial neutrality. (*Id.* at p. 688, 709 A.2d 1230.)

The federal court similarly determined in *City and County of San Francisco v. Philip Morris, Inc.* (N.D.Cal.1997) 957 F.Supp. 1130 (*Philip Morris*) that a contingency fee agreement between several public entities and the private law firm of Lieff, Cabraser, Heinmann & Bernstein in tobacco-related tort litigation was not barred under *Clancy*. The court stated, "While the contingent fee arrangement here clearly gives Lieff, Cabraser a stake in the litigation, the Court finds that this case is sufficiently distinguisha-

ble from *Clancy* to allow for the government's retention of private counsel. First, as plaintiffs explain, Lieff, Cabraser is acting here as co-counsel, with plaintiffs' respective government attorneys retaining full control over the course of the litigation. Because plaintiffs' public counsel are actually directing this litigation, the Court finds that the concerns expressed in *Clancy* regarding overzealousness on the part of private counsel have been adequately addressed by the arrangement between Lieff, Cabraser and the plaintiffs." (*Id.* at p. 1135.) The court in *Philip Morris* also found that the case before it was a civil tort action, which further distinguished it from *Clancy*. (*Ibid.*)

Thus, these federal and state courts have ruled that the propriety of a contingency fee agreement between a public entity and private counsel must be evaluated on a case-by-case basis, by examining the terms of the agreement to determine whether prosecutorial neutrality has been preserved by the government attorneys retaining control over discretionary decisionmaking, such as settlement and dismissal, and by considering the factual circumstances of each case.

D. *Petitioners' Contingency Fee Agreements*

Based on my review of California Supreme Court authority and the decisions of federal and state courts, I believe that the court must evaluate the propriety of a contingency fee agreement between a public entity and private counsel in a public nuisance abatement action on a case-by-case basis. The factual circumstances of each case and the terms of each contingency fee agreement should be reviewed to determine whether "the prosecutor's *discretionary decisionmaking* has been placed within the influence

or control of an interested party" (*Hambarian*, *supra*, 27 Cal.4th at p. 841, 118 Cal.Rptr.2d 725, 44 P.3d 102), or is subject to "conflicting personal interests" (*Greer*, *supra*, 19 Cal.3d at p. 267, 137 Cal.Rptr. 476, 561 P.2d 1164). If so, the contingency fee agreements must be barred because the agreements are "antithetical to the standard of neutrality that an attorney representing the government must meet when prosecuting a public nuisance abatement action." (*Clancy*, *supra*, 39 Cal.3d. at p. 750, 218 Cal.Rptr. 24, 705 P.2d 347.)

Applying this test, I agree with the majority that, based on the record in this original proceeding, the current contingency fee agreements are not antithetical to the standard of neutrality that a government attorney must meet in a public nuisance abatement action. Here, the terms of the contingency fee agreements expressly provide that the government attorneys retain "complete control" of the litigation, including, in some instances, "all decision making authority and responsibility." It is therefore reasonable to assume at this point in the litigation that the government attorneys intend to retain control over all discretionary decisionmaking. Moreover, the factual circumstances do not include a pending or anticipated criminal prosecution arising from the alleged public nuisance, and therefore the bar on contingency fee agreements in criminal prosecutions (*Clancy*, *supra*, 39 Cal.3d at p. 748, 218 Cal.Rptr. 24, 705 P.2d 347) is not implicated. For these reasons, I believe that a contingency fee agreement is permissible in the present public nuisance abatement action and that it is not likely, under the current terms of the petitioners' contingency fee agreements, that the requirement of prosecutorial neutrality in public nuisance abatement actions will be violated.

In reaching this conclusion, I recognize the trial court's concern that "as a practical matter, it would be difficult to determine (a) how much control the government attorneys must exercise in order for a contingent fee arrangement with outside counsel [to] be permissible, (b) what types of decisions the government attorneys must retain control over, *e.g.*, settlement or major strategy decisions, or also day-to-day decisions involving discovery and so forth, and (c) whether the government attorneys have been exercising such control throughout the litigation or whether they have passively or blindly accepted recommendations, decisions, or actions by outside counsel."

However, as I have stated, the California Supreme Court has instructed that the decisions over which the government attorneys must retain control in a public nuisance abatement action are the discretionary decisions. In the public prosecutor context, our Supreme Court has observed that the prosecutor "has broad discretion over the entire course of the criminal proceedings, from the investigation and gathering of evidence, through the decisions of whom to charge and what charges to bring, to the numerous choices at trial to accept, oppose, or challenge judicial rulings." (*Hambarian, supra*, 27 Cal.4th at p. 840, 118 Cal.Rptr.2d 725, 44 P.3d 102.) In *Clancy*, the court stated that "'[t]he prosecutor's discretionary functions are not confined to the period before the filing of charges . . . A district attorney may thus prosecute vigorously, but both the accused and the public have a legitimate expectation that his [or her] zeal, as reflected in his [or her] tactics at trial, will be born of objective and impartial consideration of each individual case.'" (*Clancy*, *supra*, 39 Cal.3d at p. 749, fn. 4, 218 Cal.Rptr. 24, 705 P.2d 347.) With respect

to eminent domain actions, the court has emphasized that "'[a] government lawyer in a civil action . . . should not use his [or her] position or the economic power of the government to harass parties or to bring about unjust settlements or results." (*City of Los Angeles v. Decker, supra*, 18 Cal.3d at p. 871, 135 Cal.Rptr. 647, 558 P.2d 545.)

Thus, as emphasized in *Clancy* and *Decker*, it is the consequences of discretionary decisionmaking, rather than the details of each decision, that are significant in determining whether the standard of neutrality has been met in the litigation of a public nuisance abatement action. (*Clancy*, *supra*, 39 Cal.3d at p. 749, fn. 4, 218 Cal.Rptr. 24, 705 P.2d 347; *City of Los Angeles v. Decker*, *supra*, 18 Cal.3d at p. 871, 135 Cal.Rptr. 647, 558 P.2d 545.) Where zealous representation of the government by private counsel has a result that is just and consistent with the public interest, and the conduct of the litigation is "born of objective and impartial consideration," the trial court may reasonably determine that the government attorneys have maintained control of the discretionary decisionmaking and therefore prosecutorial neutrality has been preserved.

The trial court also has an important oversight role in ensuring prosecutorial neutrality, because the court has the "inherent power to review attorney fee contracts and to prevent overreaching and unfairness." (*Roa v. Lodi Medical Group, Inc.*, *supra*, 37 Cal.3d at p. 933, 211 Cal.Rptr. 77, 695 P.2d 164.) Thus, as a federal district court has noted, "'"[A]n attorney's right to contract for a contingent fee is not completely beyond judicial control." A lawyer is first an officer of the court, and as such his [or her] commercial contractual rights must yield to his

[or her] duty.' [Citation.]" (*Sarei v. Rio Tinto PLC* (C.D.Cal.2002) 221 F.Supp.2d 1116, 1168; see also *State of North Dakota v. Hagerty* (1998) 1998 N.D. 122, 580 N.W.2d 139, 148 [court's inherent power to supervise attorney fees].) Thus, the propriety of a contingency fee agreement may be raised at any time in the litigation, whether by a motion for disqualification or other procedural means such as the "motion to bar payment of contingent fees to private attorneys" that was filed in the case at bar.

Finally, because the decisions of the California Supreme Court, the federal courts and other state courts support my view that the propriety of a contingency fee agreement in a public nuisance abatement action must be determined on a case-by-case basis, I do not believe that the language of the contingency fee agreement is the only factor to be considered. Other significant factors must also be considered. For example, there may be public nuisance abatement actions in which parallel criminal prosecutions are pending or anticipated, because as the *Clancy* court noted, "Public nuisance abatement actions . . . often coincide with criminal prosecutions. These actions are brought in the name of the People by the district attorney or city attorney. (Code Civ. Proc., § 731.) A person who maintains or commits a public nuisance is guilty of a misdemeanor. (Pen.Code, § 372.)" (*Clancy, supra*, 39 Cal.3d at p. 749, 218 Cal.Rptr. 24, 705 P.2d 347, fn. omitted.) Another important factor that must be considered is the conduct of plaintiffs' counsel, which may reveal whether the government attorneys' discretionary decisionmaking has been placed within the influence or control of an interested party (*Hambarian, supra*, 27 Cal.4th at p. 841, 118 Cal.Rptr.2d 725, 44 P.3d 102), or is subject to conflicting personal interests

(*Greer, supra*, 19 Cal.3d at p. 267, 137 Cal.Rptr. 476, 561 P.2d 1164).

Thus, the propriety of a contingency fee agreement in a public nuisance action must be evaluated by careful consideration of the many important factors in each case, including the factual circumstances, the terms of the contingency fee agreement, and the conduct of plaintiff's counsel, because, as the *Clancy* court stated, "The justification for the prohibition against contingent fees in criminal actions extends to certain civil cases." (*Clancy, supra*, 39 Cal.3d at p. 748, 218 Cal.Rptr. 24, 705 P.2d 347.)

Therefore, based on my review of the factual circumstances in this case and the terms of the contingency fee agreements, I would conclude that the California Supreme Court's decision in *Clancy, supra*, 39 Cal.3d 740, 218 Cal.Rptr. 24, 705 P.2d 347 does not bar the public entity plaintiffs in this case from retaining private counsel under their current contingency fee agreements to assist the government attorneys in the litigation of this public nuisance abatement action.

I recognize, however, that the issue of the circumstances under which public entities may properly retain private counsel under contingency fee agreements to assist in the litigation of public nuisance abatement actions is of great public significance. For this reason, I would respectfully invite the California Supreme Court to review this issue and to provide guidance to the courts and public entities in this important and developing area of the law.

APPENDIX C

SUPERIOR COURT OF CALIFORNIA.
Santa Clara County

No. 1-00-CV-788657.

COUNTY OF SANTA CLARA, *et al.*,
Plaintiffs,

v.

ATLANTIC RICHFIELD COMPANY, *et al.*,
Defendants.

April 4, 2007.

Order Regarding Defendants' Motion to Bar Payment of Contingent Fees to Private Attorneys

---

Hon. Jack Komar, Judge of the Superior Court.

The motion by Defendants Atlantic Richfield Company; American Cyanamid Company; ConAgra Grocery Products Company; E.I. du Pont de Nemours and Company; Millennium Inorganic Chemicals Inc.; NL Industries, Inc.; and The Sherwin-Williams Company for an order to bar payment of contingent fees to private attorneys came on for hearing before the Honorable Jack Komar on April 3, 2007, at 9:00 a.m. in Department 17C. The matter having been submitted, the Court orders as follows:

I. *Defendants' Requests for Judicial Notice*

A. Defendants' request for judicial notice of Plaintiffs' agreements with outside counsel (Exs. A - I) is DENIED. While judicial notice of the agreements is not proper, the Court has considered the agreements as evidence in connection with Defendants' motion. Plaintiffs do not contest the authenticity of the agreements and have provided identical copies of some of the agreements in opposition.

B. Defendants' request for judicial notice of a minute order from *People v. Atlantic Richfield Co., et al.*, Orange County Superior Court Case No. 804030 (Ex. J), is GRANTED as to the existence of the order.

C. Defendants' request for judicial notice of the size of the budgets of the plaintiff entities (Reply Exs. A - I) is DENIED. The amount of a specific entity's budget is not a proper subject of judicial notice. An entity's projections and expectations regarding its budget may change during the course of the fiscal year at issue. Further, the sizes of the budgets are not relevant to the issues in Defendants' motion.

II. *Defendants' Motion*

Defendants seek an order precluding Plaintiffs from retaining outside counsel under any agreement in which the payment of fees and costs is contingent on the outcome of the litigation. Defendants contend the government may not retain a private attorney on a contingent fee basis to litigate a public nuisance claim.

Plaintiffs contend there is no absolute bar to retaining outside counsel on a contingent fee basis to litigate a public nuisance claim and, given the circumstances under which outside counsel was

retained in this case, disqualification of outside counsel is not warranted.

In *People ex rel. Clancy v. Superior Court* (1985) 39 Cal.3d 740 ("*Clancy*"), the California Supreme Court evaluated[d] the propriety of a contingent fee arrangement between a city government and a private attorney whom it hired to bring abatement actions under the city's nuisance ordinance." (*Clancy*, 39 Cal.3d at 743.) The California Supreme Court explained that "the contingent fee arrangement between the City and Clancy is antithetical to the standard of neutrality that an attorney representing the government must meet when prosecuting a public nuisance abatement action. In the interests of justice, therefore, we must order Clancy disqualified from representing the City in the pending abatement action." (*Id.*, at 750.)

Clancy is applicable to the instant case. Plaintiffs fail to persuasively distinguish *Clancy*, or otherwise persuasively articulate why their fee arrangements with outside counsel are proper. Plaintiffs' main argument is that the government attorneys continue to retain and/or exercise decision-making authority and control over the litigation in this case.[1] The fact

---

[1] Some of the agreements between Plaintiffs and Cotchett, Pitre & McCarthy (formerly Cotchett, Pitre & Simon) clearly state outside counsel "is given absolute discretion in the decision of who to sue and who not to sue, if anyone, and what theories to plead and what evidence to present." However, many of the Plaintiffs revised or are in the process of revising this language in their agreements with the Cotchett firm. Further, the declarations submitted in opposition to Defendants' motion uniformly state that the government attorneys have retained decision-making authority and responsibility in the case, notwithstanding the hiring of outside counsel.

remains, however, that outside counsel (*i.e.*, Thornton & Naumes, Motley Rice LLC, and Mary Alexander and Associates for the City and County of San Francisco, and Cotchett, Pitre & McCarthy for most of the other public entities) are co-counsel in this case. They are performing work as attorneys for the plaintiff government entities, and consequently they are subject to the standard of neutrality articulated in *Clancy*. Oversight by the government attorneys does not eliminate the need for or requirement that outside counsel adhere to the standard of neutrality.

Moreover, as a practical matter, it would be difficult to determine (a) how much control the government attorneys must exercise in order for a contingent fee arrangement with outside counsel be permissible, (b) what types of decisions the government attorneys must retain control over, *e.g.*, settlement or major strategy decisions, or also day-to-day decisions involving discovery and so forth, and (c) whether the government attorneys have been exercising such control throughout the litigation or whether they have passively or blindly accepted recommendations, decisions, or actions by outside counsel. Plaintiffs in their opposition characterize outside counsel as "collaborators." (*See* Pls.' Mem. Opp. Motion, at 8:21-22.) Given the inherent difficulties of determining whether or to what extent the prosecution of this nuisance action might or will be influenced by the presence of outside counsel operating under a contingent fee arrangement, outside counsel must be precluded from operating under a contingent fee agreement, regardless of the government attorneys' and outside attorneys' well-meaning intentions to have all decisions in this litigation made by the government attorneys.

Plaintiffs make two additional arguments in their opposition. Plaintiffs contend public policy should preclude disqualification in this case, because the government entities and lawyers lack the resources and specific expertise necessary to prosecute this action. The standard of neutrality should apply, however, regardless of the wealth of either the government lawyer or the defendant. (*See City & County of San Francisco v. Philip Morris, Inc.* (N.D. Cal. 1997) 957 F. Supp. 1130, 1136 fn. 3 ["The Court wishes to make clear that it does not base this ruling on plaintiffs' argument that, as a matter of public policy, a contingent fee arrangement is necessary in this case to make it feasible for the financially strapped government entities to match resources with the wealthy tobacco defendants. The Court does not find this argument convincing in light of the concerns expressed in *Clancy*."].)

Plaintiffs also contend Defendants' motion is premature, unless and until Defendants are found liable, the Court determines the appropriate form and scope of the abatement remedy, and the Court determines the appropriate amount of fees in this case. This action may be resolved prior to such determinations, however, *e.g.*, by way of settlement or by way of other dispositive motion. If Defendants are entitled to neutral prosecution by government attorneys who are not operating under a contingent fee arrangement, then they are so entitled throughout the prosecution of this case.

Accordingly, Defendants' motion for an order precluding Plaintiffs from retaining outside counsel under any agreement in which the payment of fees and costs is contingent on the outcome of the litigation is GRANTED. Plaintiffs shall have 30 days to

file with the court new fee agreements in accordance with this order. In lieu of filing the actual agreements, Plaintiffs may provide declarations detailing the fee arrangements with outside counsel.

Dated: April 4, 2007

/s/ Jack Komar
Hon. Jack Komar
Judge of the Superior Court

Supreme Court, U.S.
FILED
NOV 2 4 2010
OFFICE OF THE CLERK

No. 10-546

IN THE

Supreme Court of the United States

ATLANTIC RICHFIELD COMPANY *et al.*,
Petitioners,

v.

COUNTY OF SANTA CLARA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari from the Supreme Court of California

BRIEF FOR AMERICAN CHEMISTRY COUNCIL, AMERICAN COATINGS ASSOCIATION, NATIONAL ASSOCIATION OF MANUFACTURERS, NATIONAL PETROCHEMICAL AND REFINERS ASSOCIATION, PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA, AND PUBLIC NUISANCE FAIRNESS COALITION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

The Supreme Court of California held that governmental plaintiffs pursuing civil public nuisance prosecutions brought "in the name of the People of the State of California" may do so under a contingency fee retainer agreement with outside plaintiffs' law firms in which the government entities agree to compensate the law firms by paying them 17 percent of any recovery. This brief addresses the following question:

1. Whether contingency fee agreements that give private prosecutors a direct, personal, and substantial pecuniary interest in the outcome of governmental prosecutions seeking to vindicate the sovereign's interests in public nuisance cases violate the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution.

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INTERESTS OF *AMICI CURIAE* [1]

Amici curiae are voluntary, nonprofit coalitions and trade organizations whose members include organizations and companies doing business in the United States including some companies that are both directly and indirectly affected by government-sponsored contingent fee litigation. Part of their roles is to serve as an advocate and ally for their membership on judicial issues at the federal, state, and local levels. *Amici* share the concerns expressed by the parties, namely, that the outcome of this case will decide whether state governments may employ contingency fee counsel to prosecute public nuisance lawsuits and thereby disregard the this Court's due process jurisprudence.

The American Chemistry Council ("ACC"), represents the leading companies engaged in the business and science of chemistry to make innovative products and services that make people's lives better, healthier and safer. *See* ACC's website, http://www.americanchemistry.com. The American Coatings Association ("ACA") represents both companies and professionals working in the paint and coatings industry. *See* ACA's website, http://www.paint.org. The National Association of Manufacturers (the "NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every

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[1] Pursuant to Supreme Court Rule 37, letters indicating the intent to file this *amici curiae* brief were received by counsel of record for all parties at least 10 days prior to the due date of this brief. All parties have consented to the filing of this *amici curiae* brief. Finally, *amici curiae* affirm that no counsel for a party authored this brief in whole or in part, or made a monetary contribution specifically for the preparation or submission of this brief.

industrial sector and in all 50 states. *See* the NAM's website, http://www.nam.org/. The National Petrochemical and Refiners Association ("NPRA") is a national trade association, representing nearly 500 members of the domestic refining industry. *See* NPRA's website, http://www.npra.org. The Property Casualty Insurers Association of America ("PCIAA") is a national trade association comprised of more than 1,000 member companies, representing the broadest cross-section of insurers of any national trade association. *See* PCIAA's website, http://www.pciaa.net/. The Public Nuisance Fairness Coalition ("PNFC") is a coalition composed of major corporations, industry organizations, legal reform organizations and legal experts concerned with the growing misuse of public nuisance lawsuits.

SUMMARY OF THE ARGUMENT

Amici curiae submit this brief to highlight particular problems raised by the Supreme Court of California's decision that merit this Court's review. In particular, they agree with Petitioners that the ruling below violates the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution which states: "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV, § 1.

The legal and ethical issues raised in this proceeding have national importance. The "neutrality" requirement at issue in this Petition is not a unique creature of California state law. It is manifestly derived from this Court's precedents – strong holdings that forbid government attorneys and officials from having personal, financial and other extraneous influences that might bias their ability to be impar-

tial or to elevate their own interest over a just outcome. *See, e.g., Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009); *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987); *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980); *Tumey v. Ohio*, 273 U.S. 510 (1927).

Through these cases, this Court firmly established the public expectation that even the "appearance of impropriety" will not be tolerated by persons when they are acting on behalf of the sovereign in judicial proceedings (be they judges or government attorneys). *Marshall*, 446 U.S. at 249 (noting that the neutrality requirement applies to both judges and government attorneys because both "must serve the public interest"). *Amici curiae*'s concerns transcend this particular petition – and present the stark question of whether this Court will deny *certiorari* and implicitly allow *all* public entities – not just states – to ignore or abolish the neutrality expected of the sovereign's attorneys in public nuisance litigation.

Amici curiae argue that there is no "middle ground" in this debate. This is especially true here because this is a public nuisance case – a quasi-criminal proceeding that justifiably implicates constitutional protections otherwise inapplicable to ordinary civil litigation. *See* Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. CIN. L. REV. 741, 787-89 (2003) ("When, however, a state's attorney general, a state official, selects an industry and files a massive legal action seeking recoupment for hundreds of millions of dollars against a defendant alleging liability under a particularly vague tort, the principles behind the void for vagueness doctrine are implicated").

Public nuisance cases are not ordinary tort lawsuits. They plainly seek to vindicate the public interest by redressing violations of rights owed to the population generally, not individuals or even groups of persons similarly affected. *See* RESTATEMENT (SECOND) OF TORTS §821B cmt. g (1979); *see also* Gifford, 71 U. CIN. L. REV. at 817. Lapses in neutrality, which this Court's precedents condemn as breaches of the public's trust, therefore entail even greater risks when they arise in public nuisance cases. Accordingly, contingency fee agreements in this context merit serious scrutiny to preserve due process guarantees.

As *Amici* will show below, contingency fee agreements not only distort the decision-making of the private attorneys who have been retained to pursue the public interest, they also distort the decision-making of the government attorneys who retained them. Collectively, the practice distorts the proper balancing of governmental authority exercised by the legislative, executive, and judicial branches in abating public nuisances.

The distortion arises because contingency fee agreements create improper financial incentives for *both* parties to the contract, the private attorney and the government. Giving states a "free ride" to pursue litigation through contingency fee agreements fosters opportunistic attitudes that distort the sovereign's duty to exercise independent and unbiased judgment – a duty owed not only to potential defendants, but also to the public. Although the California Supreme Court trivialized this risk by requiring contingency proceedings to be "controlled" by a "neutral" supervising government lawyer, the attorney-client and work product privileges precludes any meaningful

verification of this oversight. As a result, there is no practical way to assure litigants or the public of the adequacy and sufficiency of "control" measures.

This issue is of vital and urgent current interest. It is prominently featured in recent news stories, *see The State Lawsuit Racket*, Wall Street Journal (April 8, 2009) at A12 (exposing potentially lucrative "no bid" contingency fee agreements, allegedly linked to campaign contributions), and it has a long history of consequences that provoke public outrage. *See* John Moritz, *Morales Gets 4 Years in Prison*, Fort Worth Star Telegram, Nov. 1, 2003, at 1A (reporting on Texas Attorney General Morales' conviction for attempts to secure millions of dollars in contingency fees to a private tobacco lawyer). The use of contingency fee counsel by government entities to pursue *parens patriae* public nuisance prosecutions became popular in the Tobacco litigation of the 1990s and has since been used by government entities to finance and prosecute lawsuits against the gun, lead paint, poultry and drug industries. *See*, Richard O. Faulk & John S. Gray, *Alchemy in the Courtroom? The Transmutation of Public Nuisance Litigation*, 2007 MICH. ST. L. REV. 941, 960, 968-70 (2007); Adam Liptak, *A Deal for the Public: If You Win, You Lose*, N.Y. TIMES, July 9, 2007, at A10.

By allowing contingency fee counsel to pursue *parens patriae* public nuisance prosecutions, the Supreme Court of California wrongly elevated the "right" of public entities to select counsel above the public's right to insist on neutral representation. If this Court denies *certiorari*, the primacy of neutrality in *parens patriae* public nuisance prosecutions will not merely be infringed – it will be effectively abolished. The very use of contingency fee agreements

infect the government's own decision-making process with extrinsic, financial considerations that are not properly focused on the public interest. Furthermore, since there are no realistic means to ensure that "supervising governmental attorneys" will actually exercise responsible control, the protection afforded by California Supreme Court's decision to cure the due process violation is illusory. At its essence, therefore, the California ruling is constitutionally unsound because it replaces prophylactic due process protections with unverifiable "trust." *See, e.g,* Ronald Reagan, Remarks on Signing the Intermediate-Range Nuclear Forces Treaty (Dec. 8, 1987) (discussing the importance of avoiding blind trust as exemplified by President Reagan's signature phrase "Trust, but verify" which he represented as a translation of the Russian maxim "*doveryai, no proveryai*").

Pursuant to the Fourteenth Amendment of the U.S. Constitution, citizens are entitled to absolute confidence that when the sovereign is seeking to deprive persons of property, its counsel is seeking justice for *all* persons – including the defendants against whom the sovereign seeks relief. U.S. Const. amend. XIV, § 1. As the Court stated in *Marshall*, "[t]he neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law." 446 U.S. at 242. Maintaining allegiance to neutrality in *parens patriae* public nuisance prosecutions guarantees this important public trust.

ARGUMENT

I. CONTINGENCY FEE AGREEMENTS IMPROPERLY INFLUENCE THE REQUISITE NEUTRALITY REQUIRED OF ATTORNEYS IN *PARENS PATRIAE* PUBLIC NUISANCE LITIGATION

A. A Government Lawyer's Personal, Financial Interest in the Outcome of *Parens Patriae* Litigation That He is Prosecuting Violates Due Process

"The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases." *Marshall*, 446 U.S. at 242. For this principle to have its intended effect, it must regulate the conduct and interests of all persons who participate in the judicial process, especially government attorneys who represent the public interest.

Neutrality "promot[es] participation and dialogue by affected individuals in the decision making process." *Id.* (citing *Carey v. Piphus*, 435 U.S. 247, 259-262, 266-267 (1978)). If the neutrality requirement is compromised, citizens lose the "feeling so important to a popular government, that justice has been done" – a feeling that is generated "by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him." *Id.* (citing *Joint Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring)). Clearly, when the government's attorneys have a "direct, personal substantial pecuniary interest" in the case's outcome, *Tumey*, 273 U.S. at 523, citizens may reasonably question whether the government's counsel are neutral.

The neutrality requirement provides a vital bulwark that ensures the proper functioning of state and local governments in addressing putative public nuisances. It secures the public's confidence that their government is justly and impartially serving the public interest and is not operating under the influence of the personal pecuniary interests of the government's representatives.

To be clear, *Amici* do not challenge the legitimacy of contingency fee arrangements in all circumstances under which a public entity may pursue litigation. It is undisputed that contingency fee agreements between private practitioners and ordinary clients are ethically acceptable and play an important role in the jurisprudence of our society. When the government acts in its individual capacity (*e.g.*, enforcing a contract, collecting a debt, or suing as a property owner) it is in essence an ordinary citizen. In such cases, the Fourteenth Amendment is not violated because the attorney's duty of loyalty is not impacted by a contingency fee agreement. The client's goal of winning or negotiating the best resolution possible is entirely consistent with the counsel's duty of zealous advocacy. Both the government and the private lawyer share the private interest goal of maximizing recovery, and the fact that the attorney's fee is contingent on the ultimate outcome does not adversely affect the government's public duties.

A sovereign acting in *parens patriae,* however, is not an ordinary client. In any *parens patriae* action, the client is the "People" – the sovereign itself. When the government acts in its capacity as sovereign it has an "obligation to govern impartially [that] is as compelling as its obligation to govern at all," and the government attorney is required to use the power of

the sovereign exclusively to promote justice for *all* citizens. *Berger v. United States* (1935), 295 U.S. 78, 88. A government attorney's duty is not necessarily to prevail, or to achieve the maximum recovery; rather, "the Government wins its point when justice is done in its courts." *Brady v. Maryland* (1963), 373 U.S. 83, 88 n.2. Thus, in contrast to an ordinary citizen's goal or even the government's goal when it acts in its individual capacity, the sovereign's goal is to achieve justice, not necessarily the maximum economic benefit.

At one time, the Supreme Court of California adhered to this Court's decisions, in both spirit and application. For example, in *People ex rel. Clancy v. Superior Court,* 39 Cal. 3d 740, 746 (Cal. 1985), it acknowledged that whenever an attorney represents the sovereign, he "must act with the impartiality required of those who govern" and he must act "evenhandedly" because "he has the vast power of the government available to him." Explaining this unique role, the California Supreme Court noted that:

> [A] government lawyer's neutrality [is] essential to a fair outcome for the litigants in the case in which he is involved, [and] *it is essential to the proper functioning of the judicial process as a whole. Our system relies for its validity on the confidence of society; without a belief by the people that the system is just and impartial, the concept of the rule of law cannot survive.*

Id. at 746 (citing MODEL CODES OF PROF'L RESPONSIBILITY EC 9-1 & 9-2) (emphasis added). The ruling below, however, departs from this salutary rule, disregards this Court's precedents, and creates opportunities for unseen abuses. These opportunistic abuses can only be detected in retrospect, long after

the public's confidence in the judicial process has been compromised. Unless this Court grants *certiorari* to enforce the constitutional mandate of neutrality, California citizens, and indeed, citizens elsewhere will have no preventive guarantees. Instead, they will be relegated to treating the consequences of otherwise avoidable injuries.

B. The Sovereign's Goal of "Justice" is Improperly Compromised by Contingency Fee Counsel's Direct and Personal Pecuniary Interest in the Litigation

Under the standard articulated by this Court in *Berger, Brady* and their progeny, once private counsel are hired to represent the sovereign and are vested with the power and authority of the sovereign, their focus must shift from seeking to maximize their fees to representing the broader interests of *every citizen* within his client's jurisdiction.

Contingency fee contracts, by their very nature, however, impede counsels' ability to shift their focus from private profit to public justice. By tying counsels' compensation to the financial results of the litigation, the agreements plant the seeds of their own abuse. They accomplish this mischief by distracting private counsel from the singular goal of serving the public interest by injecting a personal financial interest in the outcome – an issue that is wholly absent when governmental employees pursue the same claims. While civil prosecutors "need not be entirely 'neutral and detached,'" *Ward v. Village of Monroeville*, 409 U.S. 57, 62 (1972), the public is entitled to know that their government is not involved in any scheme that injects "a personal interest, financial or otherwise, into the enforcement

process" that may distort prosecutorial decisions by bringing irrelevant or impermissible factors into the prosecutorial decision. *Marshall*, 446 U.S. at 249.

The potential to earn huge profits creates a powerful incentive for private attorneys to make decisions or suggest a litigation strategy based on their own pecuniary interests, rather than the interest of justice. As a scheme that injects a personal financial interest into the enforcement process, contingency fee agreements in public nuisance cases may bring "irrelevant or impermissible factors into the prosecutorial decision" and "raise serious constitutional questions." *Marshall*, 446 U.S. at 250. Personal financial incentives may be acceptable where the government is acting in its *private* capacity to enforce a contract or collect upon a debt, but they have no place in litigation on behalf of the *People*, where the public is entitled to absolute assurances of loyalty and where maximum recovery (and maximum fees for contingency fee counsel) may not necessarily serve the public interest.

Even if promises of neutrality are made by the contingency fee attorney and the sovereign, the existence of unnecessary temptations raised by the combination of extraordinary potential rewards with extraordinary power raise obvious appearances of impropriety. *See* MODEL CODE OF PROF'L RESPONSIBILITY EC 8-8 (1983). The "appearance of impropriety" created by contingency fee agreements – even if actual misconduct by private contingency fee counsel does not occur – is the lynchpin of the analysis. *Marshall*, 446 U.S. at 242. Because the fee expected by the sovereign's attorneys is contingent on the outcomeof the litigation, their goal of profit maximization undeniably and irrevocably violates the

Fourteenth Amendment's due process requirement. *See* Robert A. Levy, *Tobacco Medicaid Litigation: Snuffing Out the Rule of Law*, 22 S. Ill. U. L.J. 601, 640-41 (1998).

II. RETENTION OF "CONTROL" BY A GOVERNMENT ATTORNEY DOES NOT ELIMINATE THE DUE PROCESS VIOLATION

Although the California Supreme Court held that "control" by a "supervising governmental attorney" satisfied the neutrality mandate, its ruling actually compounded the problem. The ruling below failed to recognize that contingency fee agreements create improper financial incentives for *both* parties to the contract, the private attorney and the government. It also failed to consider how such distortions affect the proper balancing of governmental authority exercised by the legislative, executive, and judicial branches in abating public nuisances. As *Amici* will show below, the government's interests are themselves inextricably related to the success of the contingency fee arrangements.

A. Contingency Fee Agreements Improperly Tip the Scale Towards Purported "No Cost" Public Nuisance Litigation

In ordinary circumstances, "neutral" government attorneys must determine whether the public interest in pursuing public nuisance litigation outweighs the costs of that litigation, including the cost of diverting funds from other interests that are more highly valued by the public. That decision "involves a balancing of interests" that must be carried out from a position of neutrality. *Marshall*, 446 U.S. at 242; *see also Clancy*, 39 Cal.3d at 749 (noting that attor-

neys representing the government in *parens patriae* public nuisance actions possess "important governmental powers that are pledged to the accomplishment of one objective only, that of impartial justice" and that it is the "duty" of the government attorney to make a "sober inquiry into values designed to strike a just balance between the economic interests of the public and those of the landowner").

As Justice Scalia noted in *Caperton*, "What above all else is eroding public confidence in the Nation's judicial system is the perception that litigation is just a game, that the party with the most resourceful lawyer can play it to win, that our seemingly interminable legal proceedings are wonderfully self-perpetuating but incapable of delivering real-world justice." *See Caperton*, 129 S. Ct. at 2274. In this case, California is abandoning the considerations articulated in *Marshall* and *Clancy* by allowing government entities to subcontract out their public responsibility as *parens patriae* to private plaintiffs' attorneys who agree to assume the risk of financing the prosecution in return for a percentage of any recovery.

In most high profile state-sponsored *parens patriae* public nuisance actions private contingency fee plaintiff attorneys (1) conceive the idea of the litigation, (2) market the litigation to the government by describing it as "cost free" and "risk free," and (3) agree to advance the legal costs of the litigation in exchange for a personal, financial, stake in any recovery obtained from the defendant. The decoupling of the government's decision-making – both in agreeing to file the lawsuit and supervise the ongoing litigation – from any financial obligation to fund the litigation gives rise to a classic "moral hazard." *See* Danya

Bowen Matthew, *The Moral Hazard Problem With Privatization of Public Enforcement: the Case of Pharmaceutical Fraud*, 40 U. MICH. J.L. REFORM 281 (2007) (addressing moral hazard problem in context of *qui tam* litigation).

When government entities are faced with the question whether to initiate a *parens patriae* claim independently, they must choose which cases are meritorious and most likely to lead to a return on the investment of public resources (as measured not simply in dollar recoveries but in the broader benefit to the public good). This is especially true when, as in the case of lead paint at issue here, the legislative branches of the federal and state governments have already created a comprehensive statutory and regulatory network of protective laws across the full range of our federal system that directly and indirectly address the issue. *See* Faulk and Gray, 2007 MICH. ST. L. REV. at 945.

The presence of a contingency fee agreement drastically influences and alters the government calculus associated with the "balancing of interests." While the government may attempt to evaluate the factual bases and potential benefits of a lawsuit, the lack of any offsetting financial cost necessarily weighs in favor of prosecution. The financial incentives are further perverted as the case proceeds, because any effort to aggressively monitor the progress of the litigation leads to a diversion of its public resources. *See* Matthew, 40 U. MICH. J.L. REFORM at 297-98.

Because the government's investment in the *parens patriae* public nuisance actions "is minimal, and the potential payoff is sizeable, the Government will behave opportunistically and allow [contingency fee counsel] to prosecute excessive numbers of [such]

cases, regardless of their merit." *Id.* at 300-01. "Moreover, the Government, as a result of the moral hazard, exercises suboptimal caution in selecting legal theories, which arguments to make, and which strategies to employ." *Id.* at 301. "The Government imagines it has nothing to [lose] even if these cases fail because all immediate costs of failed cases . . . are borne by the private plaintiff [counsel]." *Id.* "Thus, in the face of weak monitoring incentives, the Government will allow cases based on weak facts or even unfounded or experimental theories of recovery to proceed. Nothing is immediately lost to the Government for this carelessness." *Id.*

Rather than neutral decisions motivated in the first instance by a government attorney's impartial balancing of the public interest of the people he serves as the sovereign's representative, the government's decisions originate in the financial calculations of private counsel searching for potential deep-pocket private defendants.

> [M]ost often, the power shift is not simply one between two elected branches of government. . . . Instead, public policy decisions regarding which public health and safety crisis to address and who should be held financially accountable for these matters have been functionally delegated to a small handful of mass products plaintiffs' lawyers who specialize in litigation brought by states and municipalities against products manufacturers.

Donald G. Gifford, *Impersonating the Legislature: State Attorneys General and Parens Patriae Product Litigation*, 49 B.C. L. REV. 913, 921 (2008).

But, of course, there are indirect costs to the public. "This suboptimal exercise of care allows the Government to take on (or allow) prosecution of cases that well may be weakly supported, poorly reasoned, and therefore of limited value as either a legal precedent or as a signal to future actors who wish to avoid engaging in fraudulent conduct. When such cases proceed, the public good is not served." *See* Matthew, 40 U. MICH. J.L. REFORM at 301-02. Among other things, moral hazard costs include:

- the risk of compromising socially important goals,
- the imposition of unnecessary litigation costs on parties to excessive litigation,
- the risk of establishing unclear or affirmatively bad legal precedent, and
- the risk of sending mixed deterrence signals to other providers and manufacturers who may be targeted as . . . defendants in the future.

Id. at 303-04. Without the offsetting weight of the natural and inherent costs associated with bringing litigation, these moral hazard costs are ignored and/or casually discarded.

B. Contingency Fee Agreements Improperly Affect Fundamental Decisions of Whether and How to Prosecute a *Parens Patriae* Action and Chill Public-serving Settlement Decisions.

The close relationship between the government's attorneys and their contingency fee counsel presents a special problem that cannot be disregarded. Once a government entity enters into a contingency fee

agreement with private attorneys, its ability to secure the continued services of those attorneys necessarily depends upon its willingness to continue to pursue a monetary damages award that will make the representation worth the private attorneys' time.

If the government attorney believes that a non-monetary solution or a lesser settlement is a preferable result, that opinion may raise serious personal and ethical conflicts. The government attorney may feel obliged to allow substantial compensation to lawyers who have been working intensely on the matter, and may feel pressure to approve an outcome that is financially beneficial to counsel but that is less favorable for the People or justice in general. Thus, the government has an artificial incentive to forego alternative approaches – such as seeking purely equitable or injunctive relief or electing to suspend the litigation in preference for other government action – not because those alternatives fail to protect the public interest, but because they will not allow for the potential financial payout the government now needs to retain its legal team. As Professor David Dana explains:

> [S]ometimes public interest considerations dictate dropping litigation altogether or focusing on non-monetary relief. But contingency fee lawyers, perhaps unlike most government lawyers or even most outside hourly fee lawyers, arguably can be expected to pursue the maximum monetary relief for the state without adequately considering whether that relief advances the public interest and/or whether the public interest would be better served by foregoing monetary claims or some fraction of them, in return for non-monetary concessions.

David Dana, *Public Interest and Private Lawyers: Toward a Normative Evaluation of Parens Patriae Litigation By Contingency Fee*, 51 DEPAUL L. REV. 315, 323 (2001). This vexing problem is a foreseeable consequence of human relationships based on *financial arrangements* of these types and only strict adherence to the Fourteenth Amendment requirement can prevent it from arising.

In the context of a *parens patriae* claim, these moral hazard costs give rise not only to a suboptimal public outcome but to an abandonment of the government's Fourteenth Amendment due process obligation to exercise its quasi-sovereign authority in an impartial manner.

III. DUE PROCESS VIOLATIONS CANNOT BE CURED BY SUPERVISING GOVERNMENT ATTORNEYS

The trial court in this case wisely followed this Court's precedents by ruling that ethics cannot be selectively imposed. They must apply to everyone – or else they are meaningless. *See County of Santa Clara, et al. v. Atlantic Richfield Co., et al.*, Case No. CV-788657, May 22, 2007 Order at *3 (Cal. App. Dept. Super. Ct., Santa Clara County) (noting that governmental oversight "does not eliminate the need for or requirement that outside counsel adhere to a standard of neutrality" because as a practical matter it is impossible to determine the extent that the non-neutral attorneys influence the prosecution of the case). Unfortunately, the Supreme Court of California reached a different – and erroneous – conclusion, holding that the retention of "control" by a supervising government attorney permits the use of private contingency fee counsel.

Pursuant to the Fourteenth Amendment of the Constitution, all attorneys representing the government in *parens patriae* litigation have a duty of neutrality. The duty is not limited to attorneys who are public employees. Although outside counsel may be considered "independent contractors" for some purposes, that "independence" does not liberate the government from its Constitutional obligations as the representative of the public interest.

The government's Constitutional obligations may vary depending on the types of clients they represent, *e.g.*, themselves or the people as sovereign, but they do not vary according to the type of lawyer involved. Instead, they apply equally to all counsel representing the government in that prosecution. Otherwise, duties owed to citizens will vary prejudicially depending upon whether public authorities choose to retain private counsel. There is no rational basis for "lowering the bar" for private contingency fee counsel, especially when the exercise merely makes otherwise applicable ethical and Constitutional obligations easier to hurdle – at the public's potential expense.

Due process is not satisfied merely because the public official "ultimately responsible" for the case (the "Apex Attorney") is "neutral." The Apex Attorney's decision-making authority cannot, by "proxy," cure due process violations. Like conflicts of interest, due process concerns must be imputed to the entire team. The fact that the lead attorney does not have a conflict does not cure conflicts affecting other team members. *See Young v. United States ex rel. Vuitton* (1987), 481 U.S. 787, 812-13 (noting that once a conflict is found, the entire prosecution must be recused because in a case there are "a myriad of occa-

sions for the exercise of discretion, each of which goes to shape the record in a case, but few of which are part of the record").

Once the public's confidence in the system is placed at risk, that risk cannot be eliminated by allowing Respondents' employees to serve as "neutral" watchdogs. Once the public's confidence is compromised, there is no clear remedy to restore it, nor are there any metrics to measure the injury or when, if ever, it is restored. Moreover, no compensatory remedy exists for adverse parties whose interests have been compromised by private contingency fee counsel's excessive zeal. Nothing, not even fee forfeiture, diminishes the burden of unjust recoveries improperly enhanced by visions of personal gain. This is a "common sense" concern, because:

> [a]s long as contingency fee lawyers lead the litigation, these lawyers will invariably control the development and presentation of the "facts" to the [public authorities] and their staff. Thus even when the [public authorities] are interested in securing the public interest, rather than focusing on an exclusive goal of obtaining the most amount of money, and when they devote resources to active supervision of the litigation, the [public authorities] and their staff may lack the necessary information to shape litigation outcomes.

Dana, 51 DEPAUL L. REV. at 329. This is especially true in this case, where, according to their own publicity, the private contingency fee lawyers are among the nation's most prominent and successful advocates. It is inconceivable that such persons were hired as mere ministerial "assistants" to be "supervised" in the same manner as a subordinate county

attorney. Instead, as a practical matter, private counsel, not governmental lawyers, will control this matter. It cannot be otherwise, however well-intentioned the government's protests to the contrary may be.

As this Court correctly noted:

> A concern for actual prejudice in such circumstances misses the point, for what is at stake is the public perception of the integrity of our criminal justice system. "[J]ustice must satisfy the appearance of justice" [*Offutt v. United States* (1954), 348 U.S. 11, 14, 75 S.Ct. 11, 13, 99 L.Ed. 11], and a prosecutor with conflicting loyalties presents the appearance of precisely the opposite. Society's interest in disinterested prosecution therefore would not be adequately protected by harmless-error analysis, for such analysis would not be sensitive to the fundamental nature of the error committed.

Vuitton, 481 U.S. at 811-12 (noting that the misuse of governmental powers unfairly harasses citizens, gives unfair advantage to the prosecutor's personal interests, and impairs public willingness to accept the legitimate use of those powers). While these sentiments were stated in the context of a criminal prosecution, their importance is no less real in public nuisance litigation where public authorities are actively exercising their police powers.

Public confidence is precious and indispensable to our democratic society, and this Court should not provide any opportunities – whether real or potential – for that trust to be compromised.

* * *

The original decision by the trial court in this action wisely recognized the cherished American rule that the paramount duty of government attorneys is not to win, but to seek justice. The ideal that attorneys representing the government in court in *parens patriae* litigation should be free of personal financial conflicts of interest is not new. It is part of the ABA Model Code of Professional Responsibility that every attorney should strive to meet. Given this protective framework, all attorneys who represent the public have an ethical duty of inflexible neutrality. For the same reasons, attorneys who have personal financial interests in the outcome of the litigation cannot, as a matter of law, be deemed "neutral" in their actions, decisions, or their advice and counsel to public authorities.

The blindfolds placed over the statues of Justice in our courthouses are not placed there merely as reminders to judges. They are applied to assure citizens that *all* persons they entrust with their liberties and resources will not only appear impartial, but also will act impartially. Although the Supreme Court of California was persuaded to remove this critical blindfold, this Court has never done so – and should not allow California to do so now.

When the pursuit of public justice is tainted by the pursuit of personal gain, or when even the appearance or possibility of such a taint is presented, our nation's most precious political asset – the confidence of its people in their government's devotion to their interests – is compromised. When that occurs, every citizen's liberty is imperiled.

CONCLUSION

Accordingly, this Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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November 24, 2010

NO. 10-546

IN THE
Supreme Court of the United States

ATLANTIC RICHFIELD COMPANY, *et al.*,

Petitioners,

v.

COUNTY OF SANTA CLARA, *et al.*,

Respondents.

ON A PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF CALIFORNIA

BRIEF *AMICUS CURIAE* OF ATLANTIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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November 26, 2010

QUESTION PRESENTED

Whether contingency fee prosecutors' direct, personal, and substantial pecuniary interest in the outcome of a civil government prosecution for "public nuisance," brought "in the name of the People of the State of California" seeking to vindicate sovereign interests, and which seeks abatement of lead paint from hundreds of thousands of public and private buildings in California at a potential cost of billions of dollars, violates the Due Process Clause of the Fourteenth Amendment.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6, *amicus* states that it is a Pennsylvania not-for-profit corporation. It does not have shareholders, and is not the parent or subsidiary of any other corporation that is publicly held.

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to this Court's Rule 37.3(b), Atlantic Legal Foundation respectfully requests leave of the Court to file this brief *amicus curiae* in support of Petitioners.

Written consent to the filing of this brief has been granted by counsel for the Petitioners. Counsel for Respondents have not responded to Amicus' request for consent, necessitating the filing of this motion.

Dated: November 26, 2010

Respectfully submitted,

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INTEREST OF *AMICUS*[1]

The Atlantic Legal Foundation is a non-profit, non-partisan organization with a history of advocating limited, effective government, free enterprise, individual liberty, school choice, and the use of sound science in judicial and regulatory decision-making. Collectively, the Foundation's Board of Directors and Advisory Council have hundreds of years of experience with responsibility for business-related legal counsel and litigation at major corporations and law firms. The Foundation seeks to advance these goals through litigation, public advocacy, and education. Atlantic Legal provides *pro bono* legal representation to individuals, corporations, trade associations, and similar groups. Atlantic Legal Foundation has appeared in this Court and in numerous federal and state appellate courts as an *amicus*, as counsel to *amici*, and as counsel to a real party in interest. The Foundation's Board of Directors includes current and former General Counsels of eighteen major corporations: American Cyanamid,

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[1] In accordance with Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.2(a) counsel for *amicus* provided the requisite 10-day to counsel for the parties. Counsel for petitioner has consented to the filing of this brief; counsel for respondents have not responded to *amicus*' request for consent.

American International Group, Inc., Becton, Dickinson and Company, Bethlehem Steel Corporation, Computer Sciences Corporation, Contessa Premium Foods, CPC International Inc., Crane Co., DuPont Co., FMC Corporation, GT Solar International, Johnson & Johnson, Lockheed Martin Corporation, Monsanto, Republic National Bank of New York, Rohm and Haas Company, and Tyco International Limited.[2] Other members of the Foundation's Board of Directors and Advisory Council have substantial responsibility for business litigation at major law firms. The Foundation has been involved in cases significant to the business community and has been recognized for its advocacy of issues that deserve responsible analysis and study.

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[2] Pfizer Inc., the parent company of one of the Petitioners, has made financial contributions to the Atlantic Legal Foundation for general operating support for more than 30 years; Pfizer Inc.'s contribution in 2009 (the last complete fiscal year of the Foundation) amounted to less than 5% of Atlantic Legal Foundation's annual revenue. Petitioner E.I. du Pont de Nemours and Company ("DuPont") has made financial contributions to Atlantic Legal Foundation for more than 10 years; DuPont's contribution in 2009 amounted to approximately 4% of Atlantic Legal Foundation's annual revenue. DuPont's Senior Vice President and General Counsel is a member of the Board of Directors of Atlantic Legal Foundation, but he was not consulted with respect to, nor did he participate in, the decision of Atlantic Legal Foundation to file this *amicus* brief.

STATEMENT

Public entities, consisting of various California counties and cities have for more than ten years been prosecuting a public nuisance action against numerous businesses that manufactured lead paint. After summary judgment was granted in favor of defendants on various tort causes of action initially advanced by the public entities, the complaint eventually was amended to leave the public-nuisance action as the sole claim, and abatement as the sole remedy. Pet.App. 1a. The public entities are represented both by their own government attorneys and by several private law firms. The private law firms are retained by the public entities on a contingent fee basis pursuant to agreements that generally provided for a fee to be p[aid to the private attorneys of 17 percent of the recovery. Pet.App. 4a. The private law firms will receive no fee, and the public entities will pay nothing, if the defendants prevail on the merits. Pet.App. 4a.

Defendants (petitioners here) moved to bar the public entities from compensating their private counsel by on a contingent fee basis.

The California Supreme Court acknowledged that the contingency fee prosecutors "have a conflict of interest that potentially places their personal interests at odds with the interests of the public and of defendants in ensuring that a public prosecution is pursued in a manner that serves the public, rather than serving a private

interest." Pet.App. 26a. Nevertheless., that court held that *People ex rel. Clancy v. Superior Court* (1985) 39 Cal.3d 740, 705 P.2d 347 on which the defendants relied in the California courts, does not bar *all* contingent fee agreements with private counsel in public nuisance abatement actions if the contingent fee agreements between public entities and private counsel provide: (1) that the public-entity attorneys will retain complete control over the course and conduct of the case; (2) that government attorneys retain a veto power over any decisions made by outside counsel; and (3) that a government attorney with supervisory authority must be personally involved in overseeing the litigation. Pet.App. 37a.

Only five of the ten fee agreements between the public entities and private contingent fee counsel contain language specifying that control and supervision will be retained by the government attorneys,[3] and none of the contingent fee agreements contain the other specific provisions

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[3] The California Supreme Court opined that references in these agreements to "final authority over all aspects of the litigation" "fairly can be read to mandate that the government attorneys will supervise the work of the private attorneys, and will retain authority to control all critical decisionmaking in the case" and that the "declarations [submitted by the government attorneys and the private contingent fee lawyers] establish that such general control and supervision have been exercised and are, in fact, being exercised." Pet.App. 39a.

regarding retention of control and division of responsibility that the California Supreme Court deemed to be required to safeguard against abuse of the judicial process. Moreover, because the seven agreements that are in the record were deemed by that court to be deficient under the standard it set forth and because it could not assess the sufficiency of three agreements that were not in the record before it, the California Supreme Court reversed and remanded the matter for further proceedings consistent with its opinion, noting that the public entities could pursue the litigation assisted by private counsel on a contingent fee basis only after revising the retention agreements to conform with the requirements it set forth in its opinion. Pet.App. 39a.

SUMMARY OF ARGUMENT

The due process protections of the United States Constitution prohibits the representation of governmental units by private attorneys who have a direct contingent financial interest in the outcome of the litigation. Due process requires that government officers exercising the powers of the sovereign, and their lawyers, will be impartial and will not have a direct financial interest in the success of litigation when, as here, state or local governments act in their capacity as sovereign or as *parens patriae*.

The Fourteenth Amendment to the United States Constitution requires that those who exercise the government's powers in adjudicatory

proceedings may not have a pecuniary interest in the outcome of those proceedings. The principles of impartiality applies with equal force to the government's lawyers in civil proceedings who are held to higher standards than private lawyers because they have and overriding the responsibility to seek justice.

Private lawyers representing the government are subject to the same standards as government employees and therefore must avoid even the "potential for private interest" and who must strive "for the attainment of justice." *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 805-06, 807, 814 (1987) (plurality opinion). Because the counties and municipalities brought the underlying actions as sovereign and in the name of the People of the State of California, the private contingent fee counsel arrangements should be disallowed because those private attorneys have an interest that conflicts with the government's overriding duty to seek justice and to create both the reality and appearance of fairness.

Although courts in some states have held that it is acceptable for the government to retain private contingency fee attorneys to prosecute civil case, so long as government attorneys retain absolute control over and "retain final authority" over litigation, and so long as the private attorneys are engaged to play a "limited, subordinate role" and are "merely *assisting*" government attorneys in the litigation, such a rule is ineffective in guaranteeing a defendant's due process rights. As a practical

matter it is virtually impossible to implement that standard without intrusive and disruptive judicial inquiry and court supervision. No amount of supervision of the private contingency fee lawyers by government attorneys and no amount of *post hoc* review of contingent fee counsel's performance by a court can cure the appearance of impropriety that exists in this case.

Even if this Court were to adopt the position, in principle, that the government can retain private contingency fee attorneys if those private attorneys are subject to vigorous supervision and control, the facts of this case militates against condonation of the contingent fee arrangement between the sovereign and the firm which has a direct contingent financial interest in the outcome of the litigation because the private law firm will, and must as a practical matter, have been given broad discretion to make or influence critical decisions about the conduct and resolution of the litigation. Indeed, some of the contracts between the government entities and the private contingent fee law firms in this case failed to give the government lawyers express ultimate control and management of the litigation.

The California Supreme Court's decision in allows governments to use contingency fee lawyers, so long as the retainer agreements recit e that government staff lawyers "control" the litigation, Pet. App. 27a-39a, but imposes no effective, practical, measures to ensure control in fact by any senior government attorney.

This Court should grant the petition to resolve a question that directly impacts the due process rights of defendants in government litigation brought to "vindicate" public interests, implicates the integrity of the judicial process and has broad effect because these instances of government litigation by private contingency fee lawyers becomes more prevalent. The issue raised in the petition is "one of extreme public importance"that is "capable of repetition, yet evades review." *See State v. Lead Indus. Ass'n*, 951 A.2d 428, 470 (R.I. 2008).

ARGUMENT

I. Due Process Prohibits Representation of Public Entities By Private Contingency Fee Attorneys.

The California public entities' contingent fee arrangement with private contingent fee law firms violates the constitutional guarantees of due process. Due process requires that government officers exercising the powers of the sovereign and their lawyers will be impartial and will not have a direct contingent financial interest in the success of litigation when, as here, the counties and municipalities act in their capacities as sovereign. The contingent fee agreements inherently create incentives that defeat the objectivity of the public entities and their lawyers.

A. Due Process Requires That Those Who Exercise the State's Power in Legal Proceedings Act Impartially and Without a Financial Stake in the Outcome.

The United States Constitution requires that criminal and civil tribunals be impartial. Those who exercise the government's powers in adjudicatory proceedings may not have a pecuniary interest in the outcome. U.S. Const., amend. XIV. This Court has been mindful of the dangers of partiality or the appearance of partiality when judges, administrators or attorneys representing the public have a pecuniary interest in the outcome of litigation brought by the sovereign. *See Tumey v. Ohio,* 273 U.S. 510, 522-23 (1927); *Ward v. Village of Monroeville,* 409 U.S. 57, 58, 60 (1972); *Marshall v. Jerrico, Inc.,* 446 U.S. 238, 242 (1980); *Young v. United States ex rel. Vuitton et Fils S.A.* , 481 U.S. 787, 808 (1987).

In *Tumey,* a village mayor with authority to try those accused of violating a law prohibiting the possession of alcoholic beverages faced two potential conflicts he received a salary supplement for performing judicial duties that was funded from the fines assessed and he received the supplement only upon a conviction. Disqualification was required because "[e]very procedure which would offer a possible temptation . . . might lead him not to hold the balance nice, clear and true between the State and the accused, [and] denies the latter due

process of law." 273 U. S., at 532.[4] The *Tumey* court was concerned both with direct pecuniary interest of a judicial officer and "with a more general concept of interests that tempt adjudicators to disregard neutrality." *See Caperton v. A.T. Massey Coal Co.*, U.S. ,129 S. Ct. 2252, 2260 (2009)

In *Ward* v. *Monroeville*, 409 U. S. 57 (1972) the Court held that "[t]he fact that the mayor [in *Tumey*] shared directly in the fees and costs did not define the limits of the principle." (409 U. S., at 60) The "possible temptation" the mayor might face due to his "executive responsibilities for village finances may make him partisan to maintain the high level of contribution [to the town's general finances] from the mayor's court" was enough to bring into question his impartiality. *Id.*[5] The Court in *Gibson* v. *Berryhill*, 411 U. S. 564, 579 (1973),

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[4] The *Tumey* court held that the Due Process Clause requires that a judge must recuse himself when he has "a direct, personal, substantial, pecuniary interest" in a case and that this rule reflects the maxim that "[n]o man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity." Federalist No. 10 at 59 (J. Cooke ed. 1961) (J. Madison); *see* J. Frank, "Disqualification of Judges," 56 *Yale L. J.* 605, 611–612 (1947).

[5] In *Ward* v. *Monroeville* the mayor derived no direct personal gain because the fines the mayor assessed went into the town's general account.

another case that same term, held that "the [judge's] financial stake need not be as direct or positive as it appeared to be in *Tumey*." In *Gibson* an administrative board composed of optometrists had a pecuniary interest of "sufficient substance" such that it could not preside over a hearing against competing optometrists.

In *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 824-25 (1986) the Court further clarified the reach of the due process clause regarding a judge's financial interest in a case, stressing that it was "not required to decide whether in fact [the justice] was influenced." *Id.*, at 825 The proper constitutional inquiry is "whether sitting on the case then before the Supreme Court of Alabama 'would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true.'" *Ibid.* (quoting *Ward v. Village of Monroeville, supra*, at 60, in turn quoting *Tumey, supra*, at 532). *See also In re Murchison*, 349 U.S. 133 at 136 ("[O]ur system of law has always endeavored to prevent even the probability of unfairness. To this end . . . no man is permitted to try cases where he has an interest in the outcome.")

Recently, in *Caperton v. A. T. Massey Coal Co., Inc.*, *supra*, this Court spoke vigorously about the need for impartiality where "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable," and addressed the need to have the due process clause implemented by objective standards that do not require proof of actual bias, citing

Tumey; *Mayberry* v. *Pennsylvania*, 400 U. S. 455, at 465–466 (1971); *Lavoie*, 475 U. S., at 825.

In defining the appropriate standard this Court has asked whether, "under a realistic appraisal of psychological tendencies and human weakness," the interest "poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." *Withrow* v. *Larkin*, 421 U. S. 35, 47 (1975).

Justice Thurgood Marshall explained the rationale for this rule eloquently in *Marshall v. Jerrico, Inc.*:

> The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. See Mathews v. Eldridge, 424 U. S. 319, 424 U. S. 344 (1976). ***At the same time, it preserves both the appearance and reality of fairness, "generating the feeling, so important to a popular government, that justice has been done,"*** Joint Anti-Fascist Committee v. McGrath, 341 U. S. 123, 341 U. S. 172 (1951) (Frankfurter, J., concurring). . . .
>
> * * *
>
> A scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible

> factors into the prosecutorial decision and in some contexts raise serious constitutional questions." (citations omitted).

446 U.S. at 242, 250 (emphasis supplied).

These principles apply "with equal force to the government's civil lawyers" in civil proceedings who are held to "higher standards than private lawyers" because they "have 'the responsibility to seek justice. . . .'" *Freeport-McMoRan Oil & Gas Co. v. Federal Energy Regulatory Comm'n*, 962 F.2d 45, 47 (D.C. Cir. 1992), citing the American Bar Association, MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-14 (1981).

This Court extended these neutrality requirements -- disinterestedness and impartiality – to private lawyers representing the government, holding that they are subject to the same standards as government employees and therefore must avoid even the "potential for private interest." *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 805-06 (1987). The exercise of the state's police power often involves "considerable discretion" and critical decisions "made outside the supervision of the court." Therefor courts "must have assurance that those who would wield this power will be guided solely by their sense of public responsibility for the attainment of justice." *Id.* at 807, 814.

This Court has also viewed public nuisance actions as "akin to a criminal prosecution."

Huffman v. Pursue, Ltd., 420 U.S. 592, 604 (1975); *see also Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 487 (1987), and, as the California court below recognized, is inherently brought in the public interest. ("A public nuisance abatement action must be prosecuted by a government entity and may not be initiated by a private party." Pet. App. 22a.) These cases were brought in the California courts in the name of the "People of the State of California" in their sovereign capacity and pursuant to their *parens patriae* powers,

The conflict between personal financial gain and the public interest affects how the financially interested attorney acts and the course of action he suggests to the governmental client. The conflicts also create an appearance of impropriety that undermines public confidence in the judicial process.

Application of these principles requires that a contingent fee arrangement with private counsel should be disallowed because such arrangements give outside counsel "an interest extraneous to his official function in the actions he prosecutes on behalf of the City," *People ex rel. Clancy v. Superior Court*, 39 Cal.3d 740, 705 P.2d 347 at 351 (Cal.1985) and it is "antithetical to the standard of neutrality that an attorney representing the government must meet when prosecuting a public nuisance abatement action." *Id.* at 353.

The California Supreme Court's attempt in this case to distinguish *Clancy*, or to cabin it by referring to the specific characteristics of the defendant in *Clancy*, creates constitutionally untenable distinctions – at bottom creating different levels of constitutional protection based on the size and resources of the litigants.[6]

B. Contingent Fee Counsel's Substantial Financial Interest in the Outcome of This Action Prevents the Public Entities from Exercising Their Powers Impartially.

The use of private contingent fee counsel in cases of high public interest like these is inconsistent with the requirement of impartiality required by due process. Private contingent fee counsel's direct

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[6] The California court held that the need for a disinterested prosecutor in this case is less important because petitioners are "large corporations with access to abundant monetary and legal resources," Pet. App. at 23a, thus any concern "about the misuse of governmental resources against an outmatched individual defendant is not implicated in the present case." *Id.* at 24a. But this Court has held that the "[T]he wealth of a defendant cannot justify . . . otherwise unconstitutional" procedures. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 428 (2003); *see also BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 585 (1996) ("The fact that [defendant] is a large corporation rather than an impecunious individual does not diminish its entitlement to [due process].")

and substantial financial stake in the outcome of this litigation necessarily prevents them from seeking the overriding objective of the exercise of sovereign power – protecting the health and safety of their citizens while attaining justice. This Court has noted that a civil society under the rule of law

> must have assurance that those who would wield this power will be guided ***solely by their sense of public responsibility for the attainment of justice***. A prosecutor of a contempt action who represents the private beneficiary of the °court order allegedly violated cannot provide such assurance, for such an attorney is required by the very standards of the profession to serve two masters. The appointment of counsel for [a private party] to conduct the contempt prosecution in these cases therefore was improper.

Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787 at 814 (emphasis supplied).

The private contingent fee law firms in this case have such a direct and significant financial interest in the outcome that there is a substantial risk that they cannot be, or will not be, nor will they be perceived to be, objective and neutral. The substantial contingent fees these private attorneys may receive is creates far more than the mere possibility that the private lawyers' financial interest will determine or influence decisions that should be made by disinterested public servants,

and it thus violates due process. *See Young v. United States ex rel. Vuitton et Fils S.A.* at 805 (It is the *"potential* for private interest" that constitutes a denial of due process, "[r]egardless of whether the appointment of private counsel . . . resulted in any prosecutorial impropriety") (emphasis in original); *Marshall v. Jerrico, Inc.*, 446 U.S. 238 at 242 (No governmental official stands to profit economically from vigorous enforcement of the child labor provisions at issue and thus there is no realistic possibility that the assistant regional administrator's judgment will be distorted by the prospect of institutional gain as a result of zealous enforcement effort).

The windfalls reaped by private contingency fee attorneys can be very substantial. *See, e.g.*, R. O. Faulk and J. S. Gray, *Getting the Lead Out? The Misuse of Public Nuisance Litigation By Public Authorities and Private Counsel*, Toxics L. Rep. 170 (2006). These contingency fee arrangements frequently develop when private plaintiffs' lawyers, motivated by the possibility of lucrative damages awards, approach the government with an offer to handle a litigation at no cost to the government. *See, e.g.*, J. Beisner, J. D. Miller, and T. McSweeney, *Bounty Hunters on the Prowl: The Troubling Alliance of State Attorneys General and Plaintiffs' Lawyers,* 1 (2005), available at http://www.instituteforlegalreform.com/get_ilr_doc.php?id=939 (last accessed 11-23-2010).

The profit motive that necessarily drives contingent fee representation casts doubt on the

impartiality and neutrality of the government's case.

The neutrality principle, grounded in due process concerns, is a formidable obstacle to contingency fee arrangements. The decision of the California Supreme Court in this case, and of other courts in similar cases[7], assumes that the government's assertion of control[8] eliminates the appearance of impropriety created by the retention as prosecuting attorneys of outside counsel with a financial stake in the outcome of public nuisance actions.

The California Supreme Court in *Clancy, supra*, did not prohibit the government's use of contingent fee agreements in all cases, but because a public nuisance action involves the vindication of public rights it is in "a class of civil actions that demands

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[7] *See, e.g., State v. Lead Indus. Ass 'n, Inc.*, 951 A.2d 428, 475-477 (R.I. 2008), *Philip Morris Inc. v. Glendening*, 349 Md. 660, 709 A.2d 1230 (Md. 1998) *City and County of San Francisco v. Philip Morris, Inc.* 957 F. Supp. 1130 (N.D. Cal. 1997), *City of Grass Valley v. Newmont Mining Corp.*, No. 2:04-cv-00149-GEB-DAD, 2007 WL 4166238 (E.D. Cal. Nov. 20, 2007), *Sherwin-Williams Co. v. City of Columbus, Ohio*, No. C2-06-829, 2007 U.S. Dist. Lexis 51945 (S.D. Ohio July 18, 2007).

[8] The California Supreme Court sought to implement this supposed safeguard by setting forth several specific provisions that must be included in the contingency fee retainer agreements. *Id.* at 37a.

the representative of the government to be absolutely neutral" and involves a "balancing of interests," and "a delicate weighing of values" and therefore contingent fee agreements were prohibited because "[a]ny financial arrangement that would tempt the government attorney to tip the scale cannot be tolerated." *Id.* at 352.

C. The Measures Prescribed by the California Court Do Not Ensure the Neutrality Required by Due Process

The California Supreme Court acknowledged that the private attorneys' contingency fee arrangements create "a conflict of interest that potentially places [their] personal interest at odds with the interests of the public and of defendants in ensuring that a public prosecution is pursued in a manner that serves the public, rather than serving a private interest." Pet. App. 26a. The California Supreme Court nonetheless held that such arrangements were fair if they recite that government staff counsel retain ultimate control over all "critical discretionary decisions," such as the decision to settle the case, and that the supervising government counsel personally "oversee[] the litigation." *Id.* at 27a, 37a.

The theory, adopted explicitly or implicitly by the California court and other courts (*e.g.*, the Rhode Island Supreme Court in *State v. Lead Indu s. Ass'n*, 951 A.2d 428 (R.I. 2008), that a trial court can review the proceedings while they are ongoing to determine as a factual matter whether

contingent fee counsel is adequately supervised by government lawyers, and the proceedings are therefore sufficiently neutral would require a continuous and intrusive inquiry.

The California court relied on a formulation of contractual language that it mandated for the retention agreements. It placed such emphasis on the language of the agreements because a precise determination of whether and to what extent the county or city attorneys are exercising oversight is complicated. As the intermediate California appeals court recognized, it is extremely difficult to compare from the bench the decision-making authority of outside counsel to the authority retained by the attorney general. *See County of Santa Clara v. Atl. Richfield Co.*, 40 Cal. Rptr. 3d 313 (Cal. App. 2006).

But the mere inclusion of particular words in a retainer agreement is a questionable check on the influence and power of outside counsel. It is easy for the requisite contractual language stating that the attorney general retains control and authority over the litigation to slide into mere abstractions. The California court based its holding on the assumption that the trial court can review the proceedings after they are concluded to determine as a factual matter whether contingent fee counsel was adequately supervised by the government and sufficiently neutral to justify any contingent fee that may be earned. But no amount of supervision by government attorneys and no amount of *post hoc* review of contingent fee counsel's performance can

cure the appearance of impropriety that exists in this case, where private contingent fee counsel become the government's representatives.

Reliance on the mere words of the retainer agreement is not sufficient in most cases. It is easy to include the requisite contractual formulaic language stating that the county or city attorney retains control and authority over the litigation, but these clauses may be mere abstractions. It is often extremely difficult for the court to compare the decision-making authority of outside contingency fee counsel with the authority retained by the government officials. The mere inclusion of particular words in a retainer agreement is a questionable check on the influence and power of outside counsel. Even government officials' promises that they will retain complete control over the litigation lacks concrete value and provides no real assurance that public policy concerns and the interests of justice will be given priority over recovering monetary damages.

The mere inclusion of partic ular words in a retainer agreement is a questionable check on the influence and power of outside counsel. Although the California court prescribed altered language as sufficient proof of a changed relationship, the notion that a retainer agreement, however expressed, seems highly suspect. It is easy to draft the requisite contractual language stating that the county or city attorney retains control and authority over the litigation, but without experienced public attorneys and the expenditure

of considerable effort, the words of the retainer agreement are likely to be mere abstractions. Mere verbal assurances that a senior attorney in the county's or city's law department "actively participates" in the action, that the city or county attorney is the "attorney of record," and that the contract with the private contingency fee lawyers makes it abundantly clear that the public entity retains complete control over this litigation" are not adequate Such statements lack concrete value and provide no real evidence that public good will be given priority over recovery of monetary damages.

The theory, adopted explicitly or implicitly by some courts, that a trial court can review the proceedings while they are ongoing to determine as a factual matter whether contingent fee counsel is adequately supervised by government lawyers, and the proceedings are therefore sufficiently neutral would require a continuous and intrusive inquiry. Obtaining the information necessary to test sufficiency of control would be exceedingly difficult, if possible at all. If a "subordinate lawyer" exception were to be adopted, the parties would then engage in factual disputes regarding the sufficiency of control exercised by the government "supervisor." What makes this result even more problematic is that the *defendant* would have the burden of policing the relationship between the government entities and their contingent fee counsel. Government plaintiffs would most likely attempt to withhold any evidence indicating a lack of proper control on grounds of attorney-client privilege and work product protection. This Court

has recognized the impossibility of monitoring a conflict of interest once it is found. *See Young v. United States ex rel. Vuitton* 481 U.S. 787, 812-813 (1987)(plurality opinion):

> Appointment of an interested prosecutor is also an error whose effects are pervasive. Such an appointment calls into question, and therefore requires scrutiny of the conduct of an entire prosecution, rather than simply a discrete prosecutorial decision. Determining the effect of this appointment thus would be extremely difficult. A prosecution contains a myriad of occasions for the exercise of discretion, each of which goes to shape the record in a case, but few of which are *part* of the record.

(emphasis in original).

The problem with the decisions which rely on contractual language to preserve a defendant's due process rights is that they fail to confront some difficult, but vital, practical issues: (i) whether the professed control over the litigation is actually asserted is almost impossible to determine, (ii) the appearance to the public of an improper financial motive is not eliminated by government reassurances that "we're still in charge," and (iii) regardless of the extent of government control, the contingent fee counsel's profit motive necessarily colors, and therefore corrupts, the day to day decision-making required in the prosecution of any case, including one on behalf of the government.

Ultimately, we submit, no amount of ostensible "control" can mask the fact that, unlike the government, contingent fee counsel are "in it for the money."

The ability or willingness of the government entities to monitor in detail and control the daily activities of outside contingency fee lawyers is in doubt. Indeed, in this case and others, it is precisely the public agencies in-house staffs' asserted lack of requisite knowledge and unwillingness to expend in-house attorney time to litigate these cases that led them to retain private contingency fee lawyers in the first place.

Moreover, how would a trial court and the defendants ever be able to discover the facts necessary to make a determination whether tactical and strategic decisions were not made with the contingency fee lawyers' bottom line paramount? Obtaining the information necessary to test sufficiency of control would be exceedingly difficult, if possible at all. If a "subordinate lawyer" exception were to be adopted, the parties would then engage in factual disputes regarding the sufficiency of control exercised by the government "supervisor."

What makes this result even more problematic is that the *defendant* would have the burden of policing the relationship between the government entities and their contingent fee counsel. Government plaintiffs would most likely attempt to withhold any evidence indicating a lack of proper

control on grounds of attorney-client privilege and work product protection.

This case is clearer, because several of the government entities had not even verbally reserved to themselves the right to control the litigation. This, we submit, is some indication that they have no desire to get involved in the "nuts and bolts" of the litigation, or to rein in the private contingent fee lawyers they hired. The mere drafting of a formulaic clause in the retainer agreement asserting that the county or city client has "ultimate control" is not an adequate safeguard.

Moreover, the reality is that a contingent fee arrangement such as those here eliminates an important economic constraint – cost – on the pursuit of marginal cases. Because cases by litigated on behalf of the public entity by private contingent fee lawyers are essentially free of cost or risk to the public entity client, there is no meaningful counterbalancing element when the public entity is weighing the decision to sue, the decision to discontinue the case, or the decision to settle for nominal damages.

The impetus that induced the public entities to enter into contingent fee arrangements, to minimize or eliminate the cost to themselves of bringing these lawsuits, is likely to induce them to expend little time or effort in monitoring the private contingent fee lawyers.

We do not suggest that public entities cannot retain outside counsel with particular expertise that their own legal departments lack. Indeed, they do so on a regular basis, without contingency fee arrangements.

Any contention that th e retention of private *contingent fee* counsel is the only, or best, way for the public entities to achieve "abatement" is, we submit, without merit. The counties and cities can obtain effective representation without a contingent fee arrangement that creates unlawful incentives to win instead of to seek justice. They can, of course, use their own lawyers. Alternatively, if despite their own extensive capabilities, they nonetheless believe they need expertise they do not have, they can hire private outside lawyers on an hourly or flat rate basis. In short, there was no necessity for the public plaintiffs to compromise the their impartiality and integrity, or the public interest, by retaining private contingent fee lawyers.[9]

We respectfully submit that the arrangement between the public entities and the private

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[9] In the private sector "many companies have described a preference for implementing fixed or retainer fee arrangements, and commented on how this type of fee arrangement helps to promote better alignment with in-house law department economics." Association of Corporate Counsel, LEADING PRACTICES IN STRATEGIC OUTSOURCING AND ALTERNATIVE SERVICE MODELS: WHAT COMPANIES ARE DOING at 4 (2004).

contingency law firms in this case, even as prescribed by the California Supreme Court, does not satisfy the due process requirements of the United States Constitutions because contingent fee counsel's profit motive necessarily colors, and therefore corrupts, the day-to-day decision-making required in any case brought in the name of the public.

CONCLUSION

The petition for a writ of certiorari should be granted.

November 26, 2010

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IN THE SUPREME COURT OF THE UNITED STATES

ATLANTIC RICHFIELD COMPANY, *ET AL.*,
Petitioners,

v.

COUNTY OF SANTA CLARA, CALIFORNIA, *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of California

BRIEF OF *AMICI CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NFIB SMALL BUSINESS LEGAL CENTER, AND PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America, National Federation of Independent Business Small Business Legal Center, and Pharmaceutical Research and Manufacturers of America (collectively "*amici*") represent large and small businesses throughout the United States. *Amici* have a strong interest in ensuring that the government not be permitted to delegate its police power functions to private attorneys with a profit interest in the outcome of a case, lest their members find themselves targeted by individuals who are clothed in the mantle of state authority, but unrestrained by the constitutional checks and ethics obligations on the exercise of that authority.

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest federation of businesses and associations. The Chamber represents three-hundred thousand direct members and indirectly represents an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress and the Executive Branch.

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[1] Counsel for both parties have consented to the filing this brief. Per Rule 37.2, counsel of record for all parties received notice at least ten days prior to the due date of *amici's* intention to file this brief. Per Rule 37.6, *amici* state that no counsel for a party has authored this brief in whole or in part, and that no person or entity, other than the *amici*, its members, or its counsel made a monetary contribution to the preparation or submission of the brief. A list of PhRMA's members is available at http://www.phrma.org/member_company_list.

To that end, the Chamber has filed more than 1,700 *amicus curiae* briefs in cases of vital concern to the nation's business community, including those addressing the constitutional, ethical, and public policy issues surrounding government hiring of private attorneys on a contingent fee basis.

The NFIB Small Business Legal Center, a nonprofit, public interest law firm established to protect the rights of America's small-business owners, is affiliated with the National Federation of Independent Business (NFIB). NFIB is the nation's oldest and largest organization dedicated to representing the interests of small-business owners throughout all fifty states. The approximately 350,000 members of NFIB own a wide variety of America's independent businesses from manufacturing firms to hardware stores.

Pharmaceutical Research and Manufacturers of America (PhRMA) is a voluntary, nonprofit association representing the nation's leading research-based pharmaceutical and biotechnology companies. PhRMA advocates in support of public policies that encourage the discovery of lifesaving and life-enhancing new medicines for patients by pharmaceutical and biotechnology research companies. In support of that mission, PhRMA members invested approximately $45.8 billion (of an industry total of approximately $65.3 billion) in 2009 in the discovery and development of new medicines. *See* 2010 Industries, *available at* http://www.phrma.org/profiles_and_reports. PhRMA member companies, which have been targeted by private lawyers acting in the name of state and local governments, are the source of a majority of all new medicines.

STATEMENT OF THE CASE

Amici adopt Petitioners' Statement of the Case.

SUMMARY OF ARGUMENT

Contingent fees gained grudging and eventually widespread acceptance as a means of providing access to justice to individuals who could not otherwise afford to bring a lawsuit. Over the past twenty-five years, however, such arrangements have been used by a wholly different party – state and local governments. They have hired private lawyers to exercise government enforcement power and promised them a percentage of the public's recovery.

While state attorneys general initially used this practice in the tobacco litigation of the 1990s, government officials now enter into contingent fee contracts to pursue everything from environmental to pharmaceutical litigation. Often, contingent fee lawyers develop the theory for such suits and then shop them around to state and local officials until they find a willing "buyer." Such arrangements are likely to become even more commonplace as Congress delegates authority to state attorneys general to enforce federal law and cash-strapped governments seek to avoid the need for an allocation of state funds.

The use of contingent fees by the government, when acting in its sovereign capacity, however, unconstitutionally introduces perverse incentives into the administration of justice. Providing a financial interest to those who pursue civil litigation on behalf of the state encourages lawyers to target "deep pockets" and focus solely on maximizing monetary recovery. Such a solitary focus is often directly contrary to the public interest, which may favor prompt non-

monetary resolution of the situation or settlement of an amount of money that is fair and just in the circumstances.

This Court has historically invalidated contingent fee arrangements where they create corrupting tendencies in the administration of government. Whether payment of contingent fee lawyers on the basis of their monetary success in state enforcement actions is a present-day example of such impropriety is a key question for this Court's consideration.

Some may suggest that the fiscal crisis facing many state and local governments necessitates the use of contingent fee arrangements in pursuing high-stakes litigation. This is not true on an economic or public policy basis. Experience shows that sacrificing a percentage of the public's recovery of taxpayer dollars to a law firm may actually cost the state more than using lawyers on the government's payroll or contracting through competitive bidding with private lawyers on an hourly or flat-fee basis. Some of the most aggressive state attorneys general have recognized this fact and pursued the largest of adversaries without resorting to contingent fee agreements.

Lower courts have not effectively addressed the issue of whether and when the government may be permitted to delegate its responsibilities to a contingent fee lawyer. The "supervision and ultimate control" test adopted by the California Supreme Court below is unworkable as it does not accord with the practical realities of litigation.

For the foregoing reasons, *amici* respectfully urge the Court to grant certiorari in this case.

ARGUMENT

I. GROWING USE OF CONTINGENT FEE AGREEMENTS BY STATE AND LOCAL GOVERNMENTS MAKES THE VALIDITY OF SUCH ARRANGEMENTS A PARTICULARLY IMPORTANT ISSUE FOR THIS COURT AT THIS TIME

Over the past twenty-five years, the practice of state attorneys general contracting with private lawyers to represent the state, and paying them a percentage of the recovery, has spiked. What began as a means to pursue "unique" high-stakes multi-state litigation against the tobacco industry is now a routine method of pursing state enforcement actions. Two developments make the practice of state and local governments hiring lawyers on a contingency fee basis likely to become even more prevalent. Congress has recently deputized state attorneys general to enforce various federal laws. In addition, as states address budgetary shortfalls, there is increased pressure to bring litigation in a manner that avoids the need for an allocation of public funds and that can generate revenue through a settlement.

A. From Tobacco and Handguns to Lead Paint and Chicken Waste, State Attorneys General are Increasingly Contracting Out to Private Lawyers and Paying Them a Percentage of Recovery

The best known examples of the use of contingent fee agreements by state governments occurred in the multi-state tobacco litigation. By 1999, attorneys general in thirty-six states had entered contingent fee arrangements with eighty-nine firms for up to a

third of any judgment or settlement reached. *See* Attorney's Fees & The Tobacco Settlement: Hearing on H.R. 2740 Before the House Comm. on the Judiciary, 105th Cong. 36 (1999) (statement of Lester Brickman, Cardozo School of Law). These contracts resulted in lucrative fees for the private lawyers involved. *See* Manhattan Inst., Center for Legal Pol'y, *Trial Lawyers, Inc.: A Report on the Lawsuit Industry in America 2003,* at 6 (2003) (estimating that approximately 300 lawyers from 86 firms would earn up to $30 billion total over 25 years from the 1998 tobacco settlement).

Despite the claims of most attorneys general during this litigation that tobacco was a "unique" situation, states and localities have hired contingent fee lawyers to attack a wide range of manufacturers and service providers. Soon after the tobacco settlement, local governments hired private attorneys to sue handgun manufacturers in a large number of cities.[2]

More recently, state and local governments have entered such public-private partnerships to bring claims against poultry producers for environmental remediation, former manufacturers of lead pigment and paint to remediate properties, and pharmaceutical manufacturers for allegedly engaging in deceptive marketing practices. *See infra* Section III. Mississippi Attorney General Jim Hood lists no less than

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[2] Most of these early cases were unsuccessful. *See, e.g., City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099 (Ill. 2004); *City of Philadelphia v. Beretta U.S.A. Corp.*, 277 F.3d 415 (3d Cir. 2002); *Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 273 F.3d 536 (3d Cir. 2001); *Ganim v. Smith & Wesson Corp.*, 780 A.2d 98 (Conn. 2001); *Penelas v. Arms Tech., Inc.*, 778 So. 2d 1042 (Fla. App. Ct. 2001).

twenty-three active contingent fee contracts involving lawsuits against companies ranging from Ambac Financial Group to WorldCom-KPMG. *See* Office of the Attorney General, State of Mississippi, *Outside Legal Counsel*, *at* http://www.ago.state.ms.us/index.php/sections/divisions/outside_counsel (last visited Nov. 22, 2010).

The alliance between contingent fee lawyers and state attorneys general will no doubt continue because these cases give the state executive branch and local governments a new revenue source without having to raise taxes. These lawsuits also give government officials an opportunity to achieve a regulatory objective that the majority of the electorate, as represented by their legislators, may not support. *See id.* As Robert B. Reich, Secretary of Labor in the Clinton Administration, has sagely observed, "The strategy may work, but at the cost of making our frail democracy even weaker. . . . This is faux legislation, which sacrifices democracy to the discretion of administration officials operating in secrecy." Robert B. Reich, *Don't Democrats Believe in Democracy?*, Wall St. J., Jan. 12, 2000, at A22; *see also* Victor E. Schwartz, *Trial Lawyers Unleashed*, Wash. Post, May 10, 2000, at A29.

B. State Attorneys General are Taking a Larger Role in Enforcing Federal Law

State attorneys general are taking an increasing role in enforcement of federal law. This new role makes this Court's consideration of the questionable delegation of state power with payment based on the outcome of litigation even more important. Over the past two years, Congress has authorized state attorneys general to enforce an assortment of federal

laws, including those involving consumer product safety, healthcare privacy, and financial services.

The Consumer Product Safety Improvement Act of 2008 explicitly authorizes state attorneys general to bring actions in federal court on behalf of residents of their states for injunctive relief to enforce certain rules and orders of the Consumer Product Safety Commission. *See* Pub. L. No. 110-314, § 218(b) (2008) (codified at 15 U.S.C. § 2073(b)).[3] A section of the stimulus package that amends the Health Insurance Portability and Accountability Act of 1996 authorizes state attorneys general to seek injunctive relief or damages for violations of the federal healthcare privacy law. *See* Pub. L. No. 111-5, § 13410(e) (2009) (codified at 42 U.S.C. § 1320d-5). Most recently, the Dodd-Frank Wall Street Reform and Consumer Protection Act authorized state attorneys general to bring actions to enforce the federal law's residential mortgage loan origination requirements and minimum standards for residential mortgage loans. Pub. L. No. 111-203, § 1422 (2010).

Federal agencies are not permitted to enter contingent fee arrangements with private attorneys. Executive Order 13433, "Protecting American Taxpayers From Payment of Contingency Fees," 72 Fed. Reg. 28,441 (daily ed., May 18, 2007). This Executive Order, which was signed by President George W. Bush and remains in place in the Obama Administration, recognizes that hiring attorneys on a hourly

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[3] Earlier versions of the bill authorized state attorneys general to enforce any law under CPSC jurisdiction and seek "damages, restitution, or other compensation," in addition to injunctive relief. *See* CPSC Reform Act of 2007, S. 2045, § 21 (introduced Sept. 12, 2007).

or fixed fee basis, and not through a contingent fee arrangement, "help[s] ensure the integrity and effective supervision of the legal and expert witness services provided to or on behalf of the United States." *Id.* State officials that exert their power to enforce federal law, however, are not constrained by this Executive Order and therefore may hire lawyers on a contingent fee basis, even as federal regulators are themselves precluded from this practice.

C. Budgetary Pressures Provide Further Incentive for States to Enter Contingent Fee Agreements

As state and local governments contend with a prolonged recession, and widening budgetary shortfalls, there is further temptation to engage in "free" litigation. It is important that this Court recognize that the proper administration of justice must not yield to financial pressures.

State tax revenues were 8.4 percent lower in the 2009 fiscal year than in 2008, and an additional 3.1 percent lower in 2010, while the need for state-funded services did not decline. *See* Elizabeth McNichol, *et al.*, *States Continue to Feel Recession's Impact*, at 1 (Center on Budget & Priorities, 2010), *at* http://www.cbpp.org/files/9-8-08sfp.pdf. Forty-six states struggled to address budget gaps in their fiscal year 2011 budgets, which totaled $125 billion. *Id.* at 4. Experts predict that state fiscal problems will continue into 2012 and beyond. *See id.* at 1.

Counties and municipalities share these challenges. According to a June 2010 survey, sixty-four percent of responding counties anticipated a revenue shortfall at the beginning of their current fiscal year.

See Nat'l Ass'n of Counties, *How are Counties Doing?: An Economic Status Survey*, at 1 (2010), *at* http://www.naco.org/research/pubs/Documents/Surveys/Research%20Surveys/How%20are%20Counties%20Doing%20An%20 Economic%20Status%20Survey%20July%202010.pdf. For instance, the County of Santa Clara made significant cuts to address a $273 million deficit in its fiscal year 2010 budget. *See* Denis C. Theriault, *Santa Clara County Approves Painful Budget Cuts to Close $273 Million Deficit*, Mercury News, June 19, 2009.

State and local governments may suggest that such dire financial times underscore the need for them to have flexibility to engage in creative ways of financing law enforcement efforts. By entering into contingent fee arrangement that requires no immediate out-of-pocket expenditure, a state attorney general, county or district attorney, and other official can circumvent the need for a legislative appropriation. Just as contingent fee litigation is not "free" to private litigants, it is not free to governments. As discussed in Section II.C. *infra*, sacrificing a percentage of government's recovery of taxpayer dollars to a law firm may actually cost more than using lawyers already on the public payroll or contracting with private lawyers on an hourly or flat-fee basis.

Nor do fiscal concerns trump the constitutional and public policy implications of such contracts. *See, e.g., City and County of San Francisco v. Philip Morris*, 957 F. Supp. 1130, 1136 n.3 (N.D. Cal. 1997) (finding unconvincing "plaintiff's argument that, as a matter of public policy, a contingent fee arrangement is necessary . . . to make it feasible for the financially strapped government entities to match resources

with the wealthy [corporate] defendants"). This is not the type of "access to justice" that contingent fees were meant to promote.

II. THIS CASE RAISES SIGNIFICANT QUESTIONS THAT GO TO THE CORE OF JUST ENFORCEMENT OF LAW

A. The Purpose of Contingent Fees is to Provide Access to Justice to Individuals Who Cannot Otherwise Afford to Bring A Lawsuit; Government Use is Suspect

Contingent fees, once viewed as illegal in the United States,[4] gained grudging acceptance in the late nineteenth century. *See, e.g.*, Final Report of the Comm. on Code of Professional Ethics, 33 A.B.A. Rep. 567, 579 (1908) (Canon 13 of the Canons of Ethics) (approving of contingent fees, but carefully noting that they "should be under the supervision of the court, in order that clients may be protected from unjust charges").

Contingent fees have a worthy purpose: providing access to the legal system, regardless of means. *See* Lester Brickman, *Contingency Fees Without Contingencies: Hamlet Without the Prince of Denmark*, 37 UCLA L. Rev. 29, 43-44 (1989). Contingent fees can benefit society because they can "provide the only practical means by which one having a claim against another can economically afford, finance, and obtain the services of a competent lawyer to prosecute his claim. . . ." Model Code of Prof'l Responsibility EC 2-

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[4] *See, e.g., Butler v. Legro*, 62 N.H. 350, 352 (1882) ("Agreements of this kind are contrary to public justice and professional duty, tend to extortion and fraud, and are champertous and void").

20 (1980). As one commentator observed of the American system, "contingent fees are generally allowed in the United States because of their practical value in enabling the poor man with a meritorious cause of action to obtain competent counsel." *See* Alfred D. Youngwood, *The Contingent Fee-A Reasonable Alternative?*, 28 Mod. L. Rev. 330, 334 (1965).

When contingent fees do not promote access to the courts for individuals with limited means or when these fee arrangements create incentives that violate public policy, they should be viewed with skepticism and scrutiny. As United States Court of Appeals for the Eleventh Circuit Judge William H. Pryor, Jr., when he was Attorney General of Alabama, observed:

> For a long time, contingent fee contracts were considered unethical, but that view gave way to the need for poor persons with valid claims to have access to the legal system. Governments do not have this problem. Governments are wealthy, because they have the power to tax and condemn. Governments also control access to the legal system. The use of contingent fee contracts allows governments to avoid the appropriation process and create the illusion that these lawsuits are being pursued at no cost to the taxpayers. These contracts also create the potential for outrageous windfalls or even outright corruption for political supporters of the officials who negotiated the contracts.

William H. Pryor, Jr., *Novel Government Lawsuits Against Industries: An Assault on the Rule of Law*,

Presentation Before the U.S. Chamber of Commerce, June 22, 1999, *available at* http://www.fed-soc.org/publications/pubid.1570/pub_detail.asp.

Indeed, despite the widespread acceptance of contingent fee agreements today, there remain prohibitions based on sound public policy and constitutional grounds. For example, contingent fees are not permitted in criminal defense because they can create mis-incentives that threaten to corrupt justice. *See* Brickman, *supra*, at 40-41; Model Rules of Prof'l Conduct R. 1.5(d)(2) (1983). For instance, if a lawyer's recovery is based on his or her client's acquittal, the incentive is to win at any cost, possibly by suborning perjury. *See id.* In addition, contingent fee agreements in divorce cases are facially invalid because they would discourage reconciliation. *See* Model Rule of Prof'l Conduct R. 1.5(d)(1). These prohibitions on contingent fees are not exclusive, as the rule recognizes that "other law," such as that developed by courts, may provide additional restrictions. *See id.* 1.5(c).

Courts have prohibited contracts in various contexts when they place perverse incentives on the just administration of government. For example, this Court has held that contracts contingent upon obtaining legislation or executive action are void and unenforceable. *See Hazelton v. Sheckels*, 202 U.S. 71, 78-79 (1906) (holding that an agreement to sell land at a specified price was unenforceable when premised on obtaining Congressional action); *Tool Co. v. Norris*, 69 U.S. 45, 54 (1864) (finding void an agreement for compensation contingent on successfully procuring a contract to provide supplies to the government); *Marshall v. Baltimore & O. R. Co.*, 57

U.S. 314, 336 (1853) (finding void a contract upon which compensation was contingent on obtaining enactment of state legislation).

For instance, in *Norris*, the Court recognized that agreements in which a party would receive compensation based on his sale of muskets to the War Department above a certain price introduced "improper influences" with "corrupting tendency," led to "inefficiency in the public service," and "the unnecessary expenditures of the public funds." 69 U.S. at 54-55. In reasoning that is salient with respect to the case at bar, the Court concluded:

> Other agreements of an analogous character might be mentioned, which the courts, for the same or similar reasons, refuse to uphold. It is unnecessary to state them particularly; it is sufficient to observe, generally, that all agreements for pecuniary considerations to control the business operations of the Government, *or the regular administration of justice*, or the appointments to public offices, or the ordinary course of legislation, are void as against public policy, without reference to the question, whether improper means are contemplated or used in their execution. The law looks to the general tendency of such agreements; and it closes the door to temptation, by refusing them recognition in any of the courts of the country.

Id. at 55-56 (emphasis added). Whether payment of private lawyers on the basis of their success in state enforcement actions, and the amount of monetary recovery they obtain, is a present-day example of

such an agreement is an important question for this Court's consideration.

B. There are Key Differences Between Government and Private Lawyers

There are key distinctions between government attorneys and private lawyers. As this Court has recognized, the government attorney's duty is not necessarily to achieve the maximum recovery; rather, "the Government wins its point when justice is done in its courts." *Brady v. Maryland*, 373 U.S. 83, 88 n.2 (1963). A government attorney "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all," and therefore the government attorney is required to use the power of the sovereign to promote justice for all citizens. *Berger v. United States*, 295 U.S. 78, 88 (1935).

It is beyond dispute that this solemn duty applies "with equal force to the government's civil lawyers." *Freeport-McMoran Oil & Gas Co. v. Federal Energy Regulatory Comm'n*, 962 F.2d 45, 47 (D.C. Cir. 1992) (Mikva, C.J.). Thus, it has long been recognized that a government lawyer in a civil proceeding should be held to a higher standard than a private lawyer, and that in a civil proceeding "government lawyers have 'the responsibility to seek justice, and 'should refrain from instituting or continuing litigation that is obviously unfair.'" *Id.* (citing Model Code of Prof'l Responsibility EC 7-14 (1981)).

Government attorneys are best suited to carry out a State's responsibility. In California, for example, these attorneys, like other public officials, take an

oath to "support and defend the Constitution of the United States and the Constitution of the State of California against all enemies, foreign and domestic" and to "bear true faith and allegiance to the Constitution of the United States and the Constitution of the State of California. . . ." Cal. Const. art. XX, § 3. Government officials are statutorily prohibited from having a financial interest in matters in which they make decisions. *See* Cal. Gov't Code §§ 87100, 87103, 87105. County attorneys are paid in full through public funds to ensure that their loyalty is to the people of the State.

These rules exist to ensure that government officers and employees are independent and impartial, to avoid action that creates the appearance of impropriety, to protect public confidence in the integrity of its government, and to guard against conflicts of interest. For example, requiring a defendant to change its behavior or remediate a situation may be more important to the public interest than obtaining a high monetary award. In sum, the very nature of a contingent fee is contrary to the letter and spirit of prohibitions applicable to public actions under law.

C. State and Local Governments Have Better Options Than Hiring Lawyers on a Contingent Fee Basis

As noted earlier, the federal government pursues litigation without hiring lawyers on a contingent fee basis. Experience has proven that state and local governments also have a choice as to whether to contract with lawyers on a contingent fee basis, even when taking on the largest of adversaries.

There may be a perception that governments hire private lawyers when they identify a public need, but lack the resources to pursue the necessary litigation. In many cases, however, private lawyers conceive the theory of the litigation and then solicit state officials for a willing "buyer." *See generally* John Beisner, *et al., Bounty Hunters on the Prowl: The Troubling Alliance of State Attorneys General and Plaintiffs' Lawyers* (Inst. for Legal Reform, 2005), *at* http://www.instituteforlegalreform.org/get_ilr_doc.php?id=939. For instance, lawyers from a Texas firm initially approached Pennsylvania Attorney General Tom Corbett with a proposal to sue Janssen Pharmaceutica. *See* Editorial, *The Pay-to-Sue Business*, Wall St. J., Apr. 16, 2009, *at* http://online.wsj.com/article/SB123984994639523745 .html. When Attorney General Corbett declined the invitation, the lawyers solicited Governor Rendell, who had received substantial campaign contributions from the firm. *Id.* His General Counsel then hired the firm to bring the lawsuit under his auspices. *Id.*

Moreover, the motivation of contingent fee lawyers to maximize damages may be directly contrary to the public interest. For example, Eli Lilly settled litigation with the federal government and most of the forty-two state attorneys general that claimed the company inappropriately marketed Zyprexa® for off-label use. *In re Zyprexa Prods. Liab. Litig.*, 671 F. Supp.2d 397, 407-08 (E.D.N.Y. 2009). The private lawyers hired by Mississippi's attorney general, however, unrelentingly engaged in what a federal judge characterized as a "slash-and-burn-style of litigation," calling their effort to extract statutory penalties on a per-violation basis, in addition to actual damages, "arguably . . . an abuse of the legal

process." *Id.* at 463. If allowed to proceed, the court recognized that such litigation would "result in serious harm or bankruptcy for this defendant and the pharmaceutical industry generally, [b]ut courts cannot be used as an engine of an industry's unnecessary destruction." *Id.* at 463-64.

When litigation is truly needed, governments, unlike individuals, can pay for such a suit without engaging private attorneys on a contingent fee basis: California takes in billions of dollars of revenue each year, and it has the power to raise even more money were this to prove insufficient.

Indeed, many state officials have opted to litigate using their own taxpayer-paid government lawyers, while their colleagues in other states pursue identical or similar litigation through use of contingent fee counsel. For example, former New York Attorney General Eliot Spitzer was considered one of the most aggressive and activist state attorneys general. *See, e.g.*, Sara Fritz, *Another N.Y. Official Making National Name for Himself*, St. Petersburg Times, Nov. 29, 2002, at A1 (reporting on Spitzer's aggressive approach). Yet, he did not enter into contingent fee agreements with private lawyers as a matter of principle and practice. *See* Manhattan Inst., Center for Legal Pol'y, *Regulation Through Litigation: The New Wave of Government-Sponsored Litigation*, Conference Proceedings, at 7, 23 (Wash., D.C., June 22, 1999) (transcript of remarks), *at* http://www.manhattan-institute.org/pdf/mics1.pdf.

In the multi-state tobacco suits, the attorneys general of some states, such as Virginia, opted *not* to hire contingent fee attorneys and instead pursued the litigation with available resources. *See* Editorial,

Angel of the O's?, Richmond Times Dispatch, June 20, 2001, at A8 (comparing the additional benefits gained by Virginia citizens whose Attorney General did not hire outside counsel with the money lost by its neighbor, Maryland, to legal fees). Those that used contingent fees paid out hundreds of millions of dollars to lawyers and still more to litigate lengthy fee disputes. *See, e.g.*, Alex Beam, *Greed on Trial*, Atlantic Monthly, June 1, 2004, at 96, Scott Shane, *Judge to Rule on Dispute Over Legal Fees*, Baltimore Sun, Dec. 10, 1999, at 2B, *available at* 1999 WLNR 1128710; Robert A. Levy, *The Great Tobacco Robbery: Hired Guns Corral Contingent Fee Bonanza*, Legal Times, Feb. 1, 1999, at 27.

Other attorneys general who were not motivated by contingent fee attorneys, such as then-Delaware Attorney General Jane Brady, decided that joining the tobacco suits did not have the support of her constituents, despite the potential for a financial windfall. *See, e.g., Regulation Through Litigation, supra*, at 38. When Attorney General Brady occasionally hired private lawyers to assist her office on other matters, she did so through an open bidding process, closely-defined contractual responsibilities, limited term, and, most importantly, hourly rates. *See id.*

There may be some tasks not involving the state's enforcement power that are either routine or require special expertise for which the use of outside counsel on an *hourly* basis by state or local government may be appropriate. For example, under former Kansas Attorney General Phill Kline most legal work was undertaken by attorneys on his staff, but his office hired outside counsel to assist state attorneys when special expertise was needed, such as to defend the

state in a school finance suit. *See* Jim Sullinger, *Kansas Paid $2 Million for Legal Aid; Unusual Report Fulfills a Promise by Attorney General*, Kansas City Star, Dec. 29, 2004, at B1.

III. LOWER COURTS HAVE FAILED TO EFFECTIVELY ADDRESS THESE ISSUES

Lower courts have not effectively addressed these issues, necessitating consideration by this Court.

In Rhode Island, the state's Attorney General commenced a public nuisance action against former manufacturers of lead paint after being approached by private law firms to pursue the action on a contingent fee basis. *See Rhode Island v. Lead Indus. Ass'n*, 951 A.2d 428, 469 (R.I. 2008). In light of the special obligations of the Attorney General to the public, the Rhode Island Supreme Court (after rejecting the public nuisance claim as a matter of law) stated in dicta that agreements between the state and private lawyers must ensure that the Office of Attorney General "retains *absolute and total control over all critical decision-making. . . .*" *See id.* at 475-76 (emphasis in original). At minimum, the court found that the following provisions must be included in a contingent fee agreement between the state and private attorneys:

> (1) that the Office of the Attorney General will retain complete control over the course and conduct of the case; (2) that, in a similar vein, the Office of the Attorney General retains a veto power over any decisions made by outside counsel; and (3) that a senior member of the Attorney General's staff must be personally involved in all stages of the litigation.

Id. at 477.

The California Supreme Court followed this approach in the case at bar, which involves a similar public nuisance action against former manufacturers of lead paint pursued by Santa Clara County and later joined by the City and County of San Francisco. *See County of Santa Clara v. Superior Court*, 235 P.3d 21 (Cal. 2010). In issuing its decision, the court backtracked from a prior ruling, *Clancy v. Superior Court*, 705 P.2d 347 (Cal. 1985), that properly recognized the problematic nature of such arrangements.

In *Clancy*, the California Supreme Court recognized that the interests of government and private contingent fee attorneys are widely divergent, making such arrangements "antithetical to the standard of neutrality that an attorney representing the government must meet when prosecuting a public nuisance claim." *Id.* at 353. Unlike cases brought for private plaintiffs, the court recognized that enforcement actions "involve a balancing of interests" and a "delicate weighing of values" that "demands the representative of the government to be absolutely neutral." *Id.* at 352. The court concluded that "[a]ny financial arrangement that would tempt the government attorney to tip the scale cannot be tolerated," which "precludes the use in such cases of a contingent fee arrangement." *Id.*

In the instant case, however, the California Supreme Court limited *Clancy* and found that, in public nuisance cases, a contingent fee agreement could be valid if it includes provisions similar to those identified by the Rhode Island Supreme Court, as well as additional contractual provisions that can vary de-

pending on the circumstances of the prosecution. *See* 235 P.3d at 40.

As a practical matter, this "supervision and ultimate control" test is unworkable and unenforceable. While a court may have the authority to review the language of the contract to ensure that it contains the judicially-mandated language, it cannot oversee the day-to-day management of the litigation to ensure that the government's lawyers, not financially-motivated private attorneys, are calling the shots. Once a contract includes such standard boilerplate language regarding the government's control over the case, and a government attorney enters a pro forma appearance, the test may be met.[5] Who is actually leading the litigation would be shielded from the court's view, and that of the public, by the attorney-client privilege.

The trial court, which had invalidated the agreement, recognized the challenge of such jurisprudence:

> [A]s a practical matter, it would be difficult to determine (a) how much control the government attorneys must exercise in order for the contingent fee arrangement with outside counsel to be permissible; (b) what types of decisions the government attorneys must retain control over, e.g., settlement or major strategy decisions, or also day-to-day decisions involving discovery and so forth, and (c) whether the

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[5] In fact, in the present case, two of the legal service contracts were disclaimed or re-worded after the fact because they expressly had stated that private counsel had "absolute discretion" in the case. *See County of Santa Clara v. Atlantic Richfield Co.*, 74 Cal. Rptr.3d 842, 849 (Cal. Ct. App. 2008).

> government attorneys have been exercising such control throughout the litigation or whether they have passively or blindly accepted recommendations, decisions, or actions by outside counsel . . . .

Order Regarding Defendants' Motion to Bar Payment of Contingent Fees to Private Attorneys, *County of Santa Clara v. Atlantic Richfield Co.*, No. 1-00-CV-788657, 2007 WL 1093706 (Cal. Super. Ct., Santa Monica County, Apr. 4, 2007). "Given the inherent difficulties of determining whether or to what extent the prosecution of this nuisance action might or will be influenced by the presence of outside counsel operating under a contingency fee arrangement," the court found such agreements impermissible. *Id.* Such reasoning is closely in line with this Court's decision in *Norris*.

The issue of the validity of contingent fee agreements entered into by the state was also recently raised in Pennsylvania and Oklahoma. In Pennsylvania's lawsuit challenging Janssen Pharmaceutica's marketing practices, the state's high court found that the defendant lacked standing to challenge an agreement entitling Houston-based Bailey Perrin Bailey to fifteen percent of any damages recovered on behalf of the state. *See Commonwealth v. Janssen Pharmaceutica*, No. 24 EAP 2009, 2010 WL 4366452, at *1 (Pa. Aug 17, 2010). That agreement also restricted the Office of General Counsel's authority to settle the litigation for nonmonetary relief. *See id.* That the private attorneys drove the litigation is demonstrated by the fact that no government lawyer entered an appearance, local Philadelphia counsel for

Bailey Perrin signed the complaint, and a Bailey Perrin attorney verified the complaint. *Id.*

In Oklahoma, a district court summarily denied a challenge to contingent fee agreements between the state and three law firms. Minute Sheet, June 15, 2007 (Dkt. #1187). In that case, Attorney General W.A. Drew Edmondson has retained the firms to sue poultry companies for water pollution under an agreement that entitles the firms to receive up to half of the recovery. *See* Motion of Tyson Foods, Inc., *et al.*, for Judgment as a Matter of Law in Light of Plaintiff's Constitutional Violations at 2, *Oklahoma v. Tyson Foods, Inc.*, No. 05-cv-00329-GKF-SAJ (N.D. Okla. Feb. 28, 2007) (Dkt. #1064); *see also* Adam Liptak, *A Deal for the Public: If You Win, You Lose*, N.Y. Times, July 9, 2007, at A10, *available at* 2007 WLNR 12954006.[6]

Together, these cases show that state courts have not effectively addressed the highly questionable practice of allowing those who are deputized to enforce the law to have a financial interest in its outcome. This case provides an opportunity for the Court to revisit and apply the public policy considerations it expressed in cases such as *Norris* to the current litigation environment in which contingent fee litigation places perverse incentives on the just enforcement of law.

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[6] The Supreme Court of Louisiana has found use of contingency fee agreements by the government improper, but on state separation-of-powers grounds. In *Meredith v. Ieyoub*, 700 So. 2d 478, 481-83 (La. 1997).

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request that this Court grant the Petition for Writ of Certiorari in this action.

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